House Calendar No. 203

97TH CONGRESS *2nd Session*	HOUSE OF REPRESENTATIVES	REPORT No. 97-968

CONTEMPT OF CONGRESS

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

together with

ADDITIONAL VIEWS, MINORITY VIEWS,

and

ADDITIONAL MINORITY VIEWS

ON THE

CONGRESSIONAL PROCEEDINGS AGAINST ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FOR WITHHOLDING SUBPOENAED DOCUMENTS RELATING TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

DECEMBER 15, 1982.—Referred to the House Calendar and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C.,
December 15, 1982.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Last month, during an ongoing investigation by the Subcommittee on Investigations and Oversight into the functioning of the Superfund law in the face of recurring problems of contamination of the Nation's ground and surface water resources by illegally spilled or disposed hazardous wastes, the Subcommittee sought necessary information from the U.S. Environmental Protection Agency. Anne M. Gorsuch, Administrator, has responsibility for the administration of that law and is the custodian of the relevant documents.

Administrator Gorsuch failed to cooperate, and the Subcommittee found it necessary to subpoena her to appear with the documents. Upon refusal to comply with the subpoena, the Subcommittee voted to hold the Administrator in contempt and referred the matter to the Committee on Public Works and Transportation.

On December 10th, the Committee passed a resolution to report the Administrator's refusal to comply with the Subcommittee's subpoena to the House with the recommendation that she be cited for contempt by the House of Representatives. This action stems from the prevailing view that the Congress has an inherent right to obtain that information necessary to carry out its Constitutionally mandated legislative function, a right that has been broadly interpreted and upheld by leading Supreme Court cases.

By direction of the Committee on Public Works and Transportation, I am submitting herewith for consideration by the House, the resolution reported by the Committee and a report outlining the facts pertaining to the recent actions taken by the Committee. The report is based on a documented and complete record. It will, I believe, be useful as a resource when this matter comes before the full House.

Every best wish.

Sincerely,

JAMES J. HOWARD, *Chairman.*

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Mr. HOWARD, from the Committee on Public Works and Transportation, submitted the following

REPORT

I. INTRODUCTION

On December 10, 1982, the Committee on Public Works and Transportation, by a vote of 28 to 11, with five Members voting present, adopted the following resolution, offered by Congressman Elliott H. Levitas, recommending to the House of Representatives that Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, be cited for contempt of Congress:

> *Resolved,* That the Committee on Public Works and Transportation report and refer refusal of Anne M. Gorsuch, Administrator, Environmental Protection Agency, to comply with the subpoena dated November 16, 1982, issued by the Subcommittee on Investigations and Oversight, together with all facts in connection therewith, to the House of Representatives with the recommendation that Administrator Gorsuch be cited for contempt of the House of Representatives to the end that she may be proceeded against in a manner and form provided by law.

This action followed the December 2, 1982, action taken by the Subcommittee on Investigations and Oversight which, by a vote of 9 to 2 found the Administrator in contempt for failure to comply with a subpoena ordered by the Subcommittee, and duly served upon her on November 22, 1982. The Subcommittee also instructed its Chairman to report the matter to the full Committee for such action as it deemed appropriate.

The issuance of the subpoena was necessitated by the agency's refusal to make available to the Subcommittee pertinent and cru-

cial information documenting how the Agency is carrying out certain of its enforcement and cleanup responsibilities under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), the so-called Superfund statute.

The Subcommittee's review of the implementation of that law is part of a broader ongoing inquiry into the problem of hazardous waste contamination of the Nation's water resources. Refusal to provide the subpoenaed documents has prevented the Subcommittee from obtaining information necessary to the discharge of its responsibilities and duties.

This report outlines the Subcommittee's investigation into the Superfund program, highlighting the problems that are to be addressed by that law; the basis for the investigation, what the Subcommittee is attempting to assess with respect to the Superfund law, and the specific information being sought by the Subcommittee. It also reviews the actions of the Committee finding the Administrator in contempt, and discusses the general oversight authority of the Subcommittee as mandated by House and Committee Rules.

The action of the Committee in reporting the finding of contempt, an extraordinary sanction, reflects the importance that its Members place on the need to clean up abandoned hazardous waste sites, on protection of the health of millions of Americans, and the quality of the environment. Of course, the Committee has also acted in a manner consistent with the right of Congress, to obtain the information it deems necessary to carry out its legislative responsibilities, as vested in the Congress by Article I of the Constitution.

The Committee report concludes that the shroud of "enforcement sensitive" which has been placed by the Department of Justice over predominantly civil enforcement files within EPA as a basis for refusing to comply with the subpoena is legally unjustified, given the broad range of sensitive intelligence and national security information shared with Congress on a routine basis and would result in shutting off Congress from a significant source of information on how the laws it passes are administered, a responsibility repeatedly affirmed as within the constitutional authority of Congress. *Watkins* v. *United States,* 354 U.S. 178, 187 (1957).

Moreover, the Committee concludes that the assertion by the Department of Justice that by exercising its jurisdiction to examine the administration of laws the Congress is interfering, or becoming a "partner," in the prosecutorial process is unfounded. The Committee desires only to discharge its duty to see that the laws it passes are properly administered and has repeatedly disclaimed any intention to attempt to affect the prosecutorial decision making process. The Attorney General, and no one in EPA, has cited the Committee to a single case which adopts this *per se* interference theory. Indeed, concurrent exercise of responsibility by units of the government, be they executive agencies, state governments or legislative committees, is the rule not the exception. The power of Congress to probe the administration of laws by the executive dates from the beginning of the Republic. Indeed, the earliest examples of congressional inquiry related to examination of the manner in which executive agencies discharged their functions.

II. Background

Hazardous waste contamination of water resources

Hazardous waste contamination of the Nation's ground and surface waters may be the most significant and troublesome water quality problem facing the country for the remainder of this century. With their ability to render vast quantities of water unfit for use without treatment, the toxins that leach and flow from hundreds of active and abandoned waste sites all across the Nation pose costly and often controversial cleanup and public health problems for government officials at all levels.

The full scope of this problem is still emerging: new sites continue to be brought to the attention of regulatory officials, and thousands of known sites still need to be evaluated for the human health and water quality risks they pose. In part, this reflects the physical nature of the problem. Much of the waste is disposed in ways that first affect groundwater, which moves much more slowly than water in surface streams and rivers. Consequently, it can often be months, even years before downstream of "down-gradient" drinking water wells and nearby surface waters become contaminated.

Relatively recent advancements in analytical technology that make it possible to detect extremely small amounts of chemicals have also contributed to the perception by some that the problem is only recent in nature. Others, however, believe that the problem has long been with us.

While it is difficult to show the causal relationships between the presence of extremely low, or "trade" levels of chemicals in a water supply to a given incidence of cancer, birth defects, or other diseases, it is not impossible, and there is now a growing body of data that does more than suggest that these waste sites cause actual harm to both the environment and the public's health.

While the epidemiologic data on the harm from some of these hazardous waste sites may be arguable, there is concensus on at least some aspects of this issue: the problem of containing and cleaning up chemical waste sites is widespread, and extremely costly. Further, these sites exist because of poor or inadequate, as well as illegal, waste handling, treatment and disposal practices that have been used by the rapidly expanding chemical/petrochemical industry since World War II.

Causes of the problem

There are several ways hazardous wastes find their way into surface and ground waters. Two of these, leachate (the seeping or leaking of ground fluids) from solid waste landfills or garbage dumps, and "midnight dumping" into urban sewer systems appear to be the most common.

For years, one of the least expensive, and often most convenient methods to dispose of industrial waste products has been to put it in a landfill, or dump. Many of these were nothing more than local municipal "sanitary" landfills, designed to recycle domestic, biodegradable wastes back into the earth from which the materials comprising the wastes originally came. But they were never designed

to handle the often toxic and persistent wastes of today's modern chemical world.

In many instances, this type of chemical disposal was often legal when it occurred. Many of these sites, whether publicly or privately owned, were designated by law or local ordinance as qualified to receive "industrial" and "commercial" wastes. In others, however, the dumping was, and is, purely illegal. For example, investigations in Philadelphia and New York over the past few years by local and state authorities have led to the disclosure of unauthorized dumping of hazardous chemical wastes at municipal refuse sites and the arrest of some of the responsible parties. In the New York case, testimony and reports by the Select Committee on Crime of the New York State Senate indicates that this illegal disposal activity had been going on for years throughout several states, despite efforts by state officials to address the problem.[1]

The indiscriminate or haphazard stockpiling of waste-filled drums in open farm fields, empty city lots, active and abandoned warehouses, and the "back-lots" of small businesses or storage company properties are additional forms of land disposal. Run in a purely clandestine fashion, or under the guise of "recycling" and "recovery" operations, these sites often serve as convenient dumping or "holding" places for the chemical industry's "cats-and-dogs" wastes, the wastes that have no further fuel or economically recoverable fractions that would be of value to anyone. And they often simply stay there, corroding their containers and leaching into the ground until someone happens on them.

The "Valley of the Drums" case, discovered a few years ago in Brooks, Kentucky, near Louisville, is a classic example. More than 17,000 drums of solvents, paint sludges, and other toxic and flammable wastes were strewn about this hazardous waste landfill and surface dump located just south of Louisville. The drums, and other wastes buried in the ground led to the contamination of a nearby stream which flows into the Ohio River, a drinking water supply for many communities.

In yet another example, in Seymour, Indiana, approximately 60,000 drums of hazardous wastes and hundreds of thousands of gallons of chemical compounds in bulk storage vessels have contaminated the ground and surface waters, the former being a source of drinking water for community residents. The costs of cleaning up these sites total into the millions.

As noted above, another frequently used disposal method is the illicit dumping of hazardous wastes into urban sewer systems. The existence of local government ordinances prohibiting this type of disposal in many sewered communities around the country makes such acts illegal, as well as inappropriate.

Sometimes executed in broad daylight as well as in the dead of night, this approach for disposing of chemical wastes can accommodate a 5,000 gallon tank truck in a matter of minutes. And, while perpetrators of this type of disposal prefer to use storm sewers that by-pass local municipal wastewater treatment works, they occasionally choose poorly. The result can, and has been the disruption of

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[1] Hazardous Waste Landfill Dumping, A Report by New York State Senator Ralph Marino, Chairman, Select Committee on Crime, March 25, 1982.

operations at the local treatment plant. And when this occurs, the results can be disastrous.

For example, in 1977, in Louisville, Kentucky, illegal dumping of highly toxic chemicals into that city's sewers rendered useless much of that city's new, multi-million dollar treatment works.[2] While the parties responsible were ultimately identified and prosecuted, the plant was either totally or partially out of service for many months while special government and military teams attempted to rectify the situation. During that time, billions of gallons of raw or poorly-treated and chemically-contaminated sewage spewed into the Ohio River, a prime recreational resource and drinking water supply for numerous downstream communities.

There are several other causes or sources of chemical waste contamination which, while not necessarily as common or significant in scope as those just mentioned, are nonetheless of equal concern. They include (1) classic spills by transporters—sometimes intentionally; (2) the spreading of waste oil illegally laced with contaminants on rural roads—the spreading of oil itself being a common and apparently legal practice for dust control in some areas of the country; and (3) the literal pouring of liquid toxic wastes from tank trucks onto rural roadsides and wooded lots (often in the deal of the night) and into any other convenient place, including vacant urban lots.

Another illicit method for disposing of hazardous wastes is to mix it with waste oil and sell it as boiler fuel to unsuspecting commercial and industrial customers. A relatively "efficient" hazardous chemical disposal method, its impact on water quality is largely limited to "acid-rain" type fall-out from furnace stack emissions. For those in the area of the emission, however, the effect of burning this contaminated waste oil may be extremely hazardous as partially destroyed or heat-resistant toxics combine with furnace gases and enter the air.

The human and ecological effects of improper hazardous waste disposal

As noted earlier, the improper disposal of toxic chemical wastes can render ground water supplies, the source of drinking water for millions of Americans, unfit for use for decades without highly sophisticated and costly treatment. Toxins from abandoned hazardous waste sites have also contaminated surface waters in many areas, making them unsuitable for drinking and recreational purposes. In still other instances, these wastes have contaminated the very soil we walk on, that children play on, and in which we grow some of our food.

The presence of these toxic wastes are also believed to be the cause of many chronic illnesses, including cancer, to those who are routinely exposed to them. Simply living too close to an improperly managed and maintained site, according to some reports, can have seriously debilitating effects on public health.[3]

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[2] Implementation of the Federal Water Pollution Control Act, Hearings before the Subcommittee on Investigations and Review, July, 1977, document No. 95-32.

[3] University of Medicine and Dentistry of New Jersey, July 1982.

Concern about the effects of hazardous wastes have even triggered considerable interest in another medical area; neurotoxicity—chemical attacks on the human nervous system. Indeed, the risks to public health and welfare, as well as the damage these hazardous chemical wastes can wreak on this Nation's most valuable treasure, its water resources is almost unfathomable.

The Superfund law

In early December 1977, Congress enacted legislation to deal with abandoned and inactive waste sites: the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", commonly known as the "Superfund." The Act, which is also referred to by its acronym, CERCLA, is also intended to provide a means to respond to hazardous chemical spills.

Signed into law on December 11, 1980, the Superfund statute (P.L. 96-510) created a $1.6 billion trust fund, to be used for cleaning up hazardous waste sites and spills of hazardous chemicals. The monies for the Fund, to be collected over a five-year period commencing in 1981, are derived primarily from taxes on oil and certain chemicals; 12.5 percent of the Fund's monies come from general tax revenues.

Among the key features of the Superfund Act is a grant of authority to the government to act to control and/or eliminate a hazardous waste situation when a responsible party cannot act, or cannot be identified in a timely fashion.

Another significant feature is the law's liability provisions. Essentially, those responsible for creating a hazardous waste site (or chemical spill), be they chemical waste generators, transporters, treaters, storers, or disposers, who do not act to clean up a site themselves, are required to reimburse the Fund for the government's cost of cleaning it up and for any damage to natural resources. Further, under the law, the Government can assess treble damages against responsible parties that refuse to cooperate in cleaning up a site.

On August 14, 1981, President Reagan issued Executive Order 12316, "Responses to Environmental Damage", which ordered, among other things, that:

> The responsibility for the amendment of the NCP (National Contingency Plan) and all of the other functions vested in the President by Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, . . . is delegated to the Administrator of the Environmental Protection Agency.

Executive Order 12316 also makes the EPA Administrator responsible for (1) cleaning up abandoned or inoperative hazardous waste sites and/or determining that the responsible parties will do so; (2) carrying out the enforcement provisions of the Act, including the issuance of administrative orders and the initiation of action in the U.S. Courts for necessary remedies, including fines and penalties; and (3) managing the "Hazardous Substance Response Trust Fund." (E.O. 12316 of August 14, 1981, at 170 and 171.)

III. The Subcommittee's Oversight of the Superfund Law and the U.S. Environmental Protection Agency

On March 10, 1982, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation opened a series of hearings to examine the extent to which releases or discharges of hazardous and toxic wastes in the environment were being controlled or abated, and the effect that these releases have on the quality of the Nation's ground and surface water resources.

A central concern in this investigation and review by the Subcommittee was, and continues to be, the efforts being made by the U.S. Environmental Protection Agency to carry out the framework of Federal laws that address, in whole or in part, hazardous waste contamination of water resources. Among the statutes being examined, in addition to the Superfund law, are the Federal Water Pollution Control Act Amendments, P.L. 92-500, as amended (also referred to as the Clean Water Act); and the Resource Conservation and Recovery Act, P.L. 94-580, as amended. (A review of the Department of Transportation's efforts to carry out the Hazardous Materials Transportation Act, P.L. 93-633, as amended, and its bearing on this issue, is also included.)

Of particular interest to the Subcommittee at the March 10, 1982, hearing was the EPA's February 18, 1982, action suspending its restriction on dumping "liquids in landfills". The Agency had previously banned the disposal of containerized liquid wastes in landfills that lacked the physical safeguards necessary to prevent toxic wastes from migrating into ground and surface waters. The EPA's lifting of this restriction raised the possibility that many new "Love Canals" might be created.

EPA officials testifying at that hearing, Mr. Christopher J. Capper, Acting Assistant Administrator for Solid Waste and Emergency Response, and Mr. Gary Dietrich, Director of EPA's Office of Solid Waste, acknowledged that they did not have adequate information on the potentially lethal effect that the dumping of these hazardous wastes into landfills would have on the Nation's ground and surface waters. They also advised, among other things, that many of the several hundred existing dump sites accepting hazardous wastes do not have anti-leaking (leachate) barriers or collection and treatment systems in place, and that the then EPA rules did not restrict the dumping of any type of hazardous waste, containerized liquid or solid, into any of those facilities.

In fact, the two EPA officials were able to provide the subcommittee with very little justification for suspending the "liquid in landfills" ban while they considered a new rules on this issue. Further, they acknowledged that no assessment had been made as to how much toxic waste had been stockpiled around the country because of the ban or how much toxic waste was being dumped as a result of the ban's suspension.

On March 17, seven days after the Subcommittee's hearing, the EPA announced that it was further modifying its regulations to partially reimpose the ban. (F.R. Vol 47, No. 55, March 22, 1982, pp 12316-12318.)

On March 30, 1982, the Subcommittee met again, to further question Messrs. Capper and Dietrich about the recent actions on the "liquids in landfills" ban suspension. Their response to the Subcommittee's questions seemed to conflict with their earlier testimony, raising questions as to whether there really was any need for EPA to suspend the ban on toxic liquid waste dumping in the first place.

On July 9, 1982, the Subcommittee held an additional day of hearings, in New York City, to examine more closely the progress being made by the EPA and other state and local officials in cleaning up some of the existing hazardous waste sites being addressed by the Superfund law. Witness included the Mayor of Oswego, New York, which is the site of the Pollution Abatement Services Company, an inactive liquid waste incineration operation that had been abandoned by its owners, and citizens living in the area of the Burnt Fly Bog and Lone Pile Landfill waste sites in New Jersey. The Burnt Fly bog site involves a 160 acre abandoned private dump, and the Lone Pile Landfill involves an inactive 85 acre landfill.

Vast quantities of toxic chemicals have been disposed of at these sites, creating water pollution and public health problems that may last for decades, and cleanup costs that may run into tens of millions of dollars. Of particular concern to the witnesses, and the Subcommittee, was why it was taking so long to get these sites cleaned up. Further, testimony by the Mayor of Oswego and another witness from that community indicated that much of the waste at the PAS site, and several satellite sites had yet to be cleaned up, and the possibility existed that some of it may never be dealt with.

Residents of Port Washington, N.Y. also testified during the hearing, raising questions about whether large quantities of toxic chemicals may have been illegally disposed of in the community's domestic waste landfill. Despite the apparent litany of problems that have occurred, including explosions in nearby homes allegedly due to toxic gases escaping from the landfill, the witnesses expressed with some exasperation that they had been unable to get either the Federal EPA, the State of New York's Department of Environmental Protection, or the local community's officials to undertake the costly tests necessary to determine whether there were significant quantities of toxic chemicals present in the landfill that might contaminate the community's water supply and the nearby waters of Long Island Sound.

Finally, testimony by the U.S. General Accounting Office at the July hearing disclosed that EPA's efforts to carry out the Superfund law, including the development of implementing regulations and the "National Contingency Plan", called for by the Act, were significantly behind schedule, impeding the rate at which toxic waste sites were being cleaned up.

What the subcommittee is trying to assess

The Subcommittee's hearings and field investigations have raised a number of concerns about the adequacy of the Superfund law, and the extent to which the EPA's efforts to carry it out are both satisfactory and in keeping with the intent of the law. Further,

public disclosure of alleged illegal hazardous waste disposal activities by a Waterbury, Connecticut chemical handling firm (New York Times, October 27, 1982, at B3), activities that may also be in violation of the Federal Clean Water Act, suggest that current efforts to prevent improper and illegal disposal of hazardous wastes are inadequate.

Testimony and additional evidence available to the Subcommittee also suggests that many identified hazardous waste sites are not being fully, nor expeditiously cleaned up, and that many of the companies responsible for the wastes are not being held fully liable for their share of the cleanup costs, as the Superfund law intended.

There is also evidence suggesting that resources devoted to the EPA for pursuing leads about responsible parties are inadequate; that documents that would help to establish the responsibility of parties for some of these sites have not been expeditiously obtained; that contracts for cleaning up hazardous waste sites may be going to the very companies that had a hand in creating them; that wastes from some sites being cleaned up at public expense may appear to have been improperly disposed of, creating new cleanup problems; and, that EPA's efforts to impose administrative penalties on violators of hazardous chemical and waste laws over the past several years, have been oriented toward seeking minimum penalties, which are often further reduced during negotiations with responsible parties.

As a result, the Subcommittee's inquiry continued following the July 9, 1982, hearing and, with respect to the Superfund statute, focused heavily on the following areas:

Whether there are statutory requirements and/or administrative policies, practices and procedures that affect the government's (EPA's) ability to function effectively and achieve the objectives of the law, or whether amendments to the statute are needed;

Whether the Superfund law's enforcement provisions are being fully and effectively carried out;

Whether adequate efforts have been, or are being made to obtain and/or recover the full costs of cleaning up hazardous waste sites from responsible parties;

Whether the Fund, and the existing sources and amounts of revenue for it, particularly the tax on oil and chemicals, is adequate to address both known and potential hazardous waste sites and chemical spills; and

What information is being considered, or not being considered by the EPA, in its administration and management of the Fund, and its execution of responsibilities under the Superfund law.

Answers to these concerns will, in turn, assist the subcommittee in identifying weaknesses and/or deficiencies in the framework of Federal laws and the ways they are being carried out that may be inhibiting or precluding regulation and enforcement of hazardous waste disposal activities; in assessing the adequacy of existing statutory penalties for deterring the continuance of illegal or improper disposal of hazardous wastes; and in demonstrating how the several Federal statutes and their implementing regulations may be com-

bining to create incentives and methods for generators of hazardous wastes to dispose of toxins illegally.

In pursuit of information that would help the subcommittee make these assessments, efforts were undertaken by the Subcommittee's investigators to interview EPA Officials and others, and to review the agency's enforcement files. Among the questions needing answers:

Why aren't responsible parties being held liable for their full share of the costs of cleaning up a hazardous waste site?

Why is the EPA agreeing to limit the liability of some responsible parties, and not others; and what is the effect of this on the program and the Fund's resources?

What is the basis for the agency deciding whether it will assess civil penalties, and how much those penalties should be?

What is the EPA's basis for deciding whether it will refer a case to the Justice Department for prosecution of either civil or criminal concerns?

What does the agency do when it finds that one or more of the responsible parties may be judgment proof?

Why are some cases being settled or handled administratively, and others going to litigation?

Is the agency capable of making substantive financial analyses of the responsible parties, and how does this affect their decisions on obtaining or recovering cleanup costs from responsible parties, or on pursuing penalties through litigation?

To what extent does the ability to identify responsible parties affect agency enforcement decisions about who should pay how much of the cleanup costs and whether efforts should be made to litigate, or settle out of court?

Is the agency able to move rapidly enough to ensure that valuable and critical evidence, particularly potentially criminal evidence, is not lost, or destroyed?

Is any consideration given to whether a responsible party is involved in more than one site?

Are cleanup and other efforts to negotiate settlements or proceed with litigation hindered in any way, or being stalled, and if so, why?

Are there weaknesses or deficiencies in the statute that affect EPA's ability to enforce?

The Attorney General and Administrator Gorsuch have repeatedly asserted that congressional inquiry into these matters wrest from the Executive its ability to "take Care That the Laws be faithfully executed," U.S. Const. art. II, Sec. 3.

As the opinion of the General Counsel to the Clerk in response to the Attorney General's opinion states:

> Congress does not forgo inquiry simply because it may produce information on the government's strategies and weaknesses; the only way to correct either bad law or bad administration is to examine these matters. See Appendix M.

The position of the EPA would mean that Congress would, in effect, destroy or diminish its own oversight power in passing laws, for once passed, administration of the law would fall exclusively

within the "take care" clause power to the exclusion of oversight, sealing off from Congress an effective means for determining the sufficiency of existing law. This argument falls of its own weight. The power conferred by the Constitution under Article II, Sec. 3 is primarily to empower the President simply to carry out the laws enacted by Congress. It neither expressly nor impliedly authorizes the President, or any agency, to withhold documents essential to evaluating the administration of the laws passed by Congress which the President is to "faithfully" execute.

This kind of slipshod constitutional construction and the unsupported equivalency drawn between oversight and interference in execution of the law cannot withstand scrutiny and is rejected by your Committee.

Events leading to the subpoena of the EPA Administrator and the Agency's enforcement documents

As detailed during the Subcommittee on Investigations and Oversight's December 2, 1982 hearing, on September 13, 1982, the Subcommittee staff called and advised the Environmental Protection Agency's Region II Superfund program and legal enforcement staff of the Subcommittee's need and intent to review file materials related to the agency's efforts to carry out its hazardous waste disposal and spill cleanup mandates under the 1980 Superfund law; the Resource Conservation and Recovery Act (RCRA; P.L. 94-580, as amended), and the Clean Water Act (Pub. L. No. 92-500, as amended). EPA Region II staff (Mr. Robert Ogg and Mr. Walter Mugdun) advised that access to much of this information was restricted, and that EPA headquarters staff in the Office of Legal Enforcement Counsel, would have to be contacted. (Hearing transcript at 11.)

On September 14, 1982, the Subcommittee staff called EPA Headquarter's Office of Legal and Enforcement Counsel and spoke with Kathy Summerlee about the Subcommittee's investigation, and of the need to examine the agency's Region II Superfund enforcement files. Ms. Summerlee indicated that the person who normally handles such matters, Mr. Edward Kurent, was not in at the time, and that she would have to call back with a response.

In a subsequent phone call from Ms. Summerlee on the same day, the Subcommittee staff was advised that there would be no objection to Subcommittee review of the enforcement files, so long as the confidentiality of the information in those files was maintained, a condition that was agreed to by the Subcommittee staff. These arrangements were confirmed with Mr. Mugdan in Region II. (Hearing transcript at 12.)

On September 15, 1982, Subcommittee staff traveled to New York City and met with Mr. Ogg and Mr. Mugdan of the EPA staff concerning the review of the agency's files. Mr. Mugdan advised that any of the engineering and technical studies that were being prepared on the several EPA Region II Superfund priority sites could be made available, but that the Subcommittee could not have access to the enforcement files.

Mr. Mugdan also advised that the Subcommittee staff were to contact Mr. Richard Mays in the EPA Office of Legal and Enforcement Counsel about this reversal in the previous day's arrangements. Upon doing so, Mr. Mays advised that he had discussed the

Subcommittee's request with the EPA's Associate Administrator for General and Enforcement Counsel, Mr. Robert Perry, and that before the Subcommittee could have access to Superfund enforcement files, the agency wanted to have a formal letter from the Subcommittee requesting such access, as set out in section 104(e)(2)(D) of the Superfund law. (Hearing transcript at 12.) (Section 104(e)(2)(D) stipulates that " . . . all information reported to or otherwise obtained by the President (or any representative of the President) under this Act shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.)

On September 16, 1982, a letter to the EPA Administrator, from the Subcommittee, dated September 15, 1982, was hand delivered to the EPA Administrator (and to others in the Agency, including Mr. Perry and Mr. Mays), requesting that information and materials, documents and other records pertaining to the implementation of the Superfund law be made available to the Subcommittee (Appendix A). Following confirmation of the delivery of the letter, the Subcommittee's staff, still present in New York City, met again with Mr. Mugdan, and requested access to the agency's enforcement files.

Mr. Mugdan immediately phoned Mr. Mays at EPA Headquarters, and asked for direction and guidance. Mr. Mays advised Mr. Mugdan that the Subcommittee staff could not have access to the enforcement files, and then spoke with the Subcommittee staff, by phone, personally confirming this directive to Mr. Mugdan (Hearing transcript at 13). Prior to leaving the EPA Region II headquarters building, the Subcommittee staff met with Mr. Warren Llullewan, Region II's General Counsel, and advised him of discussions between EPA and the Subcommittee staff, and that the refusal by EPA to grant access to the staff would have to be reported to the Subcommittee.

On September 20, 1982, EPA Associate Administrator and General Counsel, Robert Perry, called the Subcommittee staff to discuss the Subcommittee's access request, and indicated his willingness to cooperate. Mr. Perry suggested that he send an EPA headquarter's official along with us to pre-screen their files and remove sensitive documents (emphasis added). He indicated that this would be necessary because he wasn't sure what was sensitive or confidential in each file. This was deemed unacceptable by the Subcommittee staff, as it would obviously continue to preclude the Subcommittee access to necessary information (Hearing transcript at 13). The conversation ended with the scheduling of a meeting involving EPA, Department of Justice (DOJ) and Subcommittee staff on September 29, 1982.

On September 29, 1982, the Subcommittee staff met with Mary Walker and Stephan Ramsey of the Department of Justice, and Mr. Perry, Mr. Mays and Mr. Gerald Yamada of the EPA, at the Department of Justice. The EPA staff deferred to Mr. Ramsey, who advised the Subcommittee staff that he had serious problems with the Subcommittee's accessing active litigation files and other documents identifying "responsible parties" and the EPA's and DOJ's enforcement strategies.

Mr. Ramsey indicated that he believed that the Subcommittee did not have the authority to access that kind of information under section 104(e)(2)(D) of the Superfund law (Hearing transcript at 14). Mr. Prolman of the Subcommittee staff advised that the Subcommittee's inquiry was being pursued under the general authority of the Congress to conduct oversight and investigations, and the rules of the House granting jurisdiction to the Committee and not simply under the authority granted by section 104(e)(2)(D) of the Superfund law.[4]

Mr. Perry and Mr. Ramsey asked the Subcommittee staff if they could be provided with a list of the documents being sought. They were advised that since the Subcommittee staff had not been allowed to conduct a visual review of any of the enforcement files, it would be impossible to provide such a list.

EPA and DOJ staff repeatedly advised that they felt that many of the types of questions the Subcommittee staff was asking, and the types of files or documents that would have to be seen to answer these questions fell into the area of those that they believed the Subcommittee could not see. Consequently, no agreement was reached, and Mr. Prolman of the Subcommittee staff advised those present that he would have to report the inability to reach an agreement to the Subcommittee.

The subpoena

On September 30, 1982, the Subcommittee met in Executive Session and authorized the issuance of subpoenas to the EPA Administrator and other EPA officials, and for agency documents, if EPA continued to refuse the Subcommittee access to its enforcement files. (Committee Rules, Committee on Public Works and Transportation, 97th Congress, Rule No. V, at 4.)

On October 1, 1982, the Subcommittee Chairman, Mr. Levitas, Ranking Minority Member Mr. Hagedorn, Congressman Molinari and members of the Subcommittee staff, met with EPA Deputy Administrator John Hernandez, EPA Chief of Staff John Daniel, and Mr. Robert Perry, Gerald Yamada and Richard Mays of the EPA Office of Legal and Enforcement Counsel. The EPA officials present assured the Subcommittee that they would cooperate and provide access to, and copies of pertinent superfund enforcement related files, and that they would so indicate in a response to the Subcommittee Chairman's September 15, 1982, letter to the Administrator. In response to questions by the EPA officials present, the Subcommittee Members assured that the confidentiality of the agency's sensitive materials would be maintained (Hearing transcript at 14, 15).

On October 7, 1982, EPA General Counsel Robert Perry transmitted a letter to the Subcommittee Chairman, in response to the Subcommittee's September 15, 1982 letter to the EPA Administrator, advising that the EPA would make their files available, *with the exception* (emphasis added) of ". . . memoranda by other agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions, names of informants in criminal

[4] After issuance of the subpoena, and at no time thereafter, has the EPA or representatives of the Department of Justice contested the jurisdiction of the Committee.

cases, and other similar material," contrary to their stated intentions on October 1, 1982 (Appendix A).

On October 8, 1982, the Subcommittee's staff met with Mr. Perry, Mr. Mays, and Mr. Yamada of EPA at its headquarters to discuss several differences between the EPA October 7, 1982 letter and what had been stated at the EPA-Subcommittee meeting on October 1, 1982. EPA again advised that the desired information would be available and that a further letter would be sent to the Subcommittee to clarify the EPA October 7, 1982, letter.

On October 12, 1982, the above-referenced follow-up letter from EPA, signed by EPA General Counsel Perry, was received by the Subcommittee. The letter did not remove any of the restrictions or exceptions on access to critical information (Hearing transcript at 16).

On October 13–15, 1982, the Subcommittee staff traveled to EPA Regions I and II (Boston and New York) to review certain Superfund site enforcement related cases, and obtained a limited number of confidential documents concerning certain of the cases, but were advised that the decisions relative to enforcement actions were made by headquarters personnel, and that the records pertaining to those matters were at EPA headquarters.

On Friday, October 29, 1982, Subcommittee staff met with Mr. Gene Lucero and Mr. Tony Montrone, of EPA's Office of Waste Programs Enforcement. The purpose of the meeting was to obtain a general overview of that office's efforts to carry out the Superfund statute's enforcement requirements, and to review EPA headquarter's enforcement files on certain cases being addressed by the program, specifically the Bridgeport, New Jersey and Seymour, Indiana sites.

At the completion of general discussions, the Subcommittee staff asked to see the agency's enforcement files on the above two sites, including those files that contained enforcement strategy and settlement decisions.

Mr. Lucero advised that he was under instructions not to let the Subcommittee's staff see these files, and that if the matter was to be pursued further, Mr. Perry, of the Office of Legal and Enforcement Counsel, would have to be contacted. At the Subcommittee's staff's request, Mr. Lucero and Mr. Montrone contacted Mr. Perry, and advised them of the situation. The meeting broke for lunch, and when the Subcommittee staff returned to Mr. Lucero's office at approximately 1:30 p.m., they were advised by Mr. Montrone to go to Mr. Perry's office.

When the Subcommittee staff arrived at Mr. Perry's office, they were informed that he was not in Washington, and that they were to meet Messrs. Michael Brown and Richard Mays of his staff. Also attending this meeting, apparently at EPA's request, was Mr. Stephen Ramsey of the Department of Justice.

Mr. Brown advised that he was only generally aware of the entire matter, and was unaware of Mr. Perry's letters of October 7 and 12, 1982, to Chairman Levitas, and the agreement that EPA Deputy Administrator John Hernandez, and EPA General Counsel Robert Perry, had made with the chairman and other Subcommittee Members on October 1, 1982, regarding the subcommittee's access to these files. Nonetheless, he advised that it was the EPA's

policy that the information being sought was considered "enforcement sensitive" and would not be made available.

The Subcommittee staff asked both Mr. Brown and Mr. Ramsey why there had been this apparent change in the agreement that had previously been reached between the agency and the Subcommittee Members allowing access to these files and documents. They admitted that there had been a change due to the issuance of a subpoena for the same type of information by the Energy and Commerce Committee of the House (Hearing transcript at 17). Further, since they could not treat two Committees of the House differently, they were reverting to their original position on the matter, which was that they could not let the Subcommittee see these "enforcement sensitive" documents. They also stated, when specifically asked, that the informal arrangements they had with the Subcommittee, as well as similar arrangements they had with the Energy and Commerce Committee (apparently to review, analyze, make notes, and obtain copies of these enforcement sensitive documents), were null and void.

Both Mr. Brown and Mr. Ramsey advised that they felt that the Subcommittee did not have the authority to see this information (Hearing transcript at 17). Mr. Brown further advised that he felt it would be more appropriate if the Subcommittee would wait until the agency had finished its work before conducting a review, (Hearing transcript 17). The meeting adjourned with no further resolution of the matter, and the Subcommittee staff reported this to the Subcommittee Chairman.

On November 22, 1982, the Subcommittee served a subpoena to EPA Administrator Anne M. Gorsuch, and required her to appear before the Subcommittee on December 2, 1982, and "to produce all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and *excepting* shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96–510, the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980"," (emphasis added.).

On November 30, 1982, the Subcommittee Chairman received a letter from Attorney General William French Smith, indicating that, in keeping with the "historic position of the Executive Branch that it is not in the public interest for sensitive documents found in open law enforcement files to be given to Congress or its committees, except in extraordinary circumstances," and that it would be preferable if the Subcommittee would "no longer seek to compel production of this class of documents from the Administrator." (Appendix G.)

The letter further suggested that "the legislative needs of your Subcommittee can be met without the production by the Administrator of sensitive documents in open law enforcement files." Referenced in, and enclosed with this letter, was a copy of a letter, also dated November 30, 1982, from the Attorney General to Congressman Dingell, Chairman of the Committee on Energy and Commerce's Subcommittee on Oversight and Investigations (Appendix H). This latter document contained similar admonitions, and sever-

al references as to the basis for the Attorney General's position on the matter.

Subcommittee hearing on subpoena

On December 2, 1982, the Subcommittee held a hearing to receive testimony from EPA Administrator Anne M. Gorsuch, in response to the subpoena, and to either receive the requested documents, or explanation as to why they were not going to be provided.

In her opening statement, Mrs. Gorsuch advised the Subcommittee ". . . that sensitive documents found in open law enforcement files will not be made available to the Subcommittee." (Hearing transcript at 57.) Citing the President's instructions to her as set forth in a memorandum dated November 30, 1982, (Appendix I), Mrs. Gorsuch further noted that:

> . . . sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstance. Because dissemination of such documents outside the Executive Branch would impair my solumn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas.

The legal claims of the Attorney General that "open law enforcement files" cannot be made available to Congress we believe have been effectively met by the opinion of the General Counsel to the Clerk. Indeed, the leading case of *McGrain* v. *Daugherty,* 273 U.S. 135, 177 (1926) expressly holds that Congress' inquiry into "whether the Attorney General and his assistants were performing or neglecting their duties *in respect of the institution and prosecution of proceedings*" (emphasis added) was a proper and lawful exercise of Congress' power.

The Attorney General relied not on any caselaw, but on letters from prior Department of Justice officials in instances involving FBI criminal investigative files, not civil law enforcement files.

The administrator of EPA pegged part of the argument on the "loss of control" resulting from production of these documents to Congress, yet when Chairman Levitas offered a proposal to permit EPA to show these documents to the Subcommittee in executive session without ever ceding actual control over the documents, this proposal was rejected by EPA. The nub of EPA's refusal is the assertion that merely permitting Members of Congress to see these documents would constitute loss of control.

While repeatedly denying that the EPA equated disclosure to Congress with public disclosure of release to litigants in pending EPA cases, EPA and Department of Justice officials returned again and again to the spectre of the damage to EPA's litigation efforts which release of enforcement sensitive files would have. At the Subcommittee hearing, Ms. Gorsuch stated:

> For example, analysis of, in a particular enforcement case against a particular defendant or group of defendants which, among other things, identifies weaknesses in either

> our information base or our legal position. If we were to allow that to become public, nothing could be of more service to defendant. (Hearing Transcript at 68.)

Despite repeated assurances that the Committee would not release the materials, EPA persisted in grounding denial to Congress on fear of release to defendants.

Noting that the Subcommittee had sought those documents associated with the priority sites listed pursuant to section 105(8)(B) of the Superfund law, Mrs. Gorsuch advised the Subcommittee that since "the agency has issued only an interim priority list, not under section 105(8)(b). The subpoena . . . does not apply to any documents, therefore, in the possession or custody of EPA." (Transcript of Hearing at 55.) This statement appeared to be intended to raise a technical objection to the subpoena, and perhaps whether it provided adequate notice to the EPA concerning the documents required to be produced. Any lack of adequate notice was belied by two factors openly conceded by EPA itself. First, Administrator Gorsuch in the very next sentence of her statement indicated her understanding of the scope of the subpoena by informing the Subcommittee that she "directed my staff to begin to gather all documents pertaining to the 160 sites now on EPA's interim priority list." *Id.* Moreover, in response to the Subcommittee subpoena EPA dispatched a memorandum to regional administrators identifying documents to be gathered for transmittal to Washington in compliance with the subpoena. That memorandum instructed the regional administrators to "gather all of the documents encompassed in the Subcommittee's subpoena" and to "segregate all materials which are 'enforcement sensitive.'" (Appendix F). The suggestion that the Administrator either could not understand the scope of the subpoena or could not comply because the sites had not yet been designated is undermined by the Administrator's instructions and her statement before the Committee.

It is well settled that minor irregularities in the form of a congressional subpoena do not invalidate it where its meaning is clear to the person to whom it is directed. *Flaxner* v. *United States,* 235 F.2d 821 (D.C. Cir. 1956).[5]

It is clear that the Administrator and her staff had long been aware of the type of documents the Subcommittee was seeking, and that steps had been taken earlier in an attempt to identify and separate them from the agency's files.

As early as November 15, 1982, before the Subcommittee issued its subpoena, but long after discussions had been initiated about access to the agency's files, EPA Associate Administrator Robert Perry sent a memorandum to all those in his Office of Legal and Enforcement Counsel, advising them ". . . that certain classes of deliberative or negotiating materials relating to the enforcement of *EPA laws* and regulations *will not be made available to Congressional committees without first being screened by me or my desig-*

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[5] In *Flaxner,* the contemnor claimed a variance between the subpoena, which was directed to the "United States Professional Workers of America" and the indictment which alleged refusal to produce records of the "United Public Workers of America." The court rejected this argument, particularly because it was the witness who had called attention to the error. 235 F.2d at 826.

nated representatives." (Emphasis added.) Included in his instructions were directives that even materials on *closed* cases be screened to assure that so-called "enforcement sensitive" documents would be withheld. (Appendix D.)

Further, on November 24, 1982, two days after the Subcommittee served its subpoena to the Administrator, Mrs. Gorsuch, herself, issued a memorandum to EPA Assistant Administrator for Solid Waste and Emergency Response, Rita Lavalle, and to all ten of the agency's Regional Administrators, indicating that—

> . . . the Department of Justice (DOJ) has advised us that certain classes of deliberative or negotiating materials must be reviewed very closely before being made available to Congressional committees. Included among these categories of documents are "enforcement sensitive" materials,. . ." (Appendix F.)

In fact, in EPA General and Enforcement Counsel Rober Perry's October 7, 1982, letter to the Subcommittee Chairman, almost a month before this hearing, the type and nature of the documents that would not be made available to the Subcommittee were well articulated: "These documents include, for example, memoranda by Agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions . . . and other similar material." (Appendix B.) Further, the Subcommittee, as noted earlier, intentionally excepted from its subpoena the vast majority documents known to be in the agency's files; shipping papers and other commercial or business documents and various technical documents involved in these sites.

As noted above, Mrs. Gorsuch informed the Subcommittee that while the agency would make most of the documents in its files available in response to the subpoena, she would not provide the Subcommittee with the so-called "enforcement sensitive" documents, those being of a nature or type as referenced by Mr. Perry in his October 7, 1982, letter. However, as to the number of documents this actually involves, there remained a question.

During her testimony on December 2, 1982, and as indicated earlier, Mrs. Gorsuch noted: "To date, at least 23 such documents from our headquarters have been preliminarily identified." (Hearing transcript at 57.) She also acknowledged in response to questioning that steps were being taken to identify the remaining balance of those documents, and that the Agency had "only gone through a small percentage of the files so far." (Hearing transcript at 95.) Indeed, the Agency itself did not know which documents, or how many, were actually going to be subject to their own criterion of "enforcement sensitive" and, therefore, to be withheld from the Subcommittee.

Subsequent questioning by the subcommittee also disclosed that the EPA had identified some 35 "enforcement-sensitive" documents involved in the three sites being examined by the House Energy and Commerce Oversight Subcommittee. Yet, despite the fact that these same three sites were included in the 160 referenced in the Public Works and Transportation subpoena, the EPA had only provided the Subcommittee with a list of 23 documents at issue. (Testimony by the EPA Associate Administrator for Legal and Enforce-

ment Counsel, Mr. Robert Perry, before the Energy and Commerce Oversight Subcommittee on the following day, December 3, 1982, disclosed that there may be as many as 51 "enforcement sensitive" documents involved in the three sites being examined by that Subcommittee, raising the prospect that as many as 2,000 to 3,000 documents may ultimately be involved, and withheld by the EPA.)

Unfortunately, the Subcommittee, and for that matter, the full Committee on Public Works and Transportation, remains unable to address these statistical inconsistencies in the Administrator's testimony. Indeed, while she and other agency officials have repeatedly advised that they are prepared to make the vast majority of all Superfund documents available to the committee for inspection and duplication, in fact, up to the date of the Administrator's appearance, December 2, 1982, this had not been the case.

As noted above, the Administrator herself advised the Subcommittee on December 2, 1982, that the agency was still reviewing the vast majority of its enforcement files in an attempt to determine just which documents are, in their opinion, "enforcement sensitive", and therefore to be withheld from the Subcommittee.

Until the review of these files is completed and the sensitive documents are removed, any review of these files by the Subcommittee or its staff would obviously provide access to the information being withheld. Consequently, each time the Subcommittee or its staff sought access to the agency's enforcement files, with the exception of the Regional files on about 3 or 4 cases examined in New York and Boston on October 13–15, the agency's staff declined to make these files available, particularly those at EPA headquarters (Hearing transcript at 137, 139).

Also of concern to the Subcommittee is the EPA's and Justice Department's apparent intent to preclude the Subcommittee access not only to "open law enforcement investigative files," but from review of documents in files of cases that have been settled or closed. In response to direct questioning about whether documents considered "enforcement sensitive" when a case was open, would be available in closed cases, EPA Enforcement Counsel, Michael Brown, advised: "Sir it would depend upon any of those documents (sic) were an ongoing instruction. For example, if there were involved in a case file an ongoing decision by the Administrator of an enforcement philosophy that would also pertain to ongoing cases, then that particular document would not." (Hearing transcript at 72.)

This statement makes clear that even closed and settled EPA cases might not be provided to the Committee. The qualification placed by Mr. brown on even closed or settled cases further diminished the vitality of the Department of Justice claim that it sought to guard against disclosures which harm "live" cases.

Ironically, this is the very type of information required by the Subcommittee to fulfill its oversight mandate to "review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws . . . in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress . . . .", (H.R. Rule X, cl. 2(b)(1), Rules of the House of Representatives.)

Yet, as noted previously, the Subcommittee's interests and concerns must of necessity not be limited to "enforcement philosophies." It must seek to examine the adequacy of existing laws and the agency's efforts to make use of those laws, and to execute its Congressional mandates and responsibilities. It must seek to determine whether there are trends, nationally, that establish whether a law is being administered evenly and appropriately, and whether the circumstances that may cause for exceptions are reasonable and justified.

In short, the Subcommittee must be able to examine how and why the agency is making its decisions to enforce, or not to enforce, to litigate or not to litigate, to settle or not settle with some or all of the parties that may be involved in the various Superfund cases. It must seek to establish just what is, and possibly more importantly, what is *not* being considered in the making of those decisions. Finally, it must assess whether there is a need for changes in existing legislation, or a need for new laws.[6]

Following the testimony of the EPA Administrator and those accompanying her, and after further questioning of the Subcommittee's staff, the Subcommittee approved, in a 9 to 2 vote, the following resolution:

> *Be it resolved,* That the subcommittee finds Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, in contempt for failure to comply with the subpoena ordered by this subcommittee and dated November 16, 1982, and the facts of this failure be reported by the Chairman of the Subcommittee on Investigations and Oversight to the Committee on Public Works and Transportation for such action as that Committee deems appropriate.

Attempt to negotiate

On December 8, 1982, a meeting was held with Subcommittee Chairman Levitas and various Administration officials, specifically, Robert Perry, EPA General Counsel; Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, DOJ; and Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, DOJ. A number of Subcommittee and full Committee staff were also in attendance.

It was the Committee's understanding that the meeting had been requested by DOJ for the purpose of resolving the impasse which existed between the Subcommittee and the Administration.

For whatever reasons, the DOJ officials stated that they had not in fact requested the meeting and that, therefore, they had not come prepared to make "an offer."

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[6] The Administrator noted, in her testimony before the Subcommittee, that production of the volume of documents sought by the subpoena would involve significant copying and personnel costs but specifically declined to contest the Subcommittee's subpoena on this ground. In fact, Mrs. Gorsuch stated that "Although I personally have grave doubts about the wisdom and the cost of requiring EPA to deliver such a volume of paper, following the direction of the President to cooperate with Congress wherever possible, the Agency is prepared to produce the majority of these documents as soon as possible." (Hearing at 56.) It is thus obvious that while the Administrator has questioned the Subcommittee's "wisdom" in seeking a large number of documents she has not contested the Subcommittee's right to do so and has not raised the burden of complying with the subpoena as an excuse for her non-compliance.

Chairman Levitas, after restating the events to date and noting particularly the original understanding of the Subcommittee, proposed the following solution:

1. Subcommittee staff would be permitted to have access to all EPA documents relative to the 160 hazardous waste sites at issue.

2. Subcommittee staff would have the unrestricted right to examine the EPA documents and determine what documents it wished to have copied and produced for further staff work or made available to the Subcommittee.

3. EPA and/or Justice Department enforcement officials would then examine the documents which the Subcommittee staff designated for copying and designate those documents which were considered by the Executive Branch to be sufficiently sensitive to an open enforcement proceeding. Copies of those documents would be made and transferred to EPA headquarters in Washington but would not be provided to the Subcommittee. Copies of all the other documents designated by the Subcommittee staff would be furnished to the Subcommittee.

4. Members of the Subcommittee and staff members would be permitted to examine the particularly sensitive documents at EPA headquarters in Washington under Executive Session Rules so that the documents would not be physically turned over to the Subcommittee and would not therefore have to be made available to every member of the House of Representatives pursuant to the Rules of the House of Representatives.

5. If the Subcommittee thereafter determined that it needed to have copies of any of the particularly sensitive documents, it would then have the right to pursue efforts to obtain copies of those documents through the mechanism of a subpoena.

6. Members of the Subcommittee and the staff would treat the information contained in the enforcement sensitive documents as confidential, recognizing the Subcommittee's right to utilize the information in any way which it found to be proper and appropriate.

Per discussion, the Administration officials noted the Chairman's proposal and promised to get back to him on it.

The next day, December 9, 1982, a letter was sent to the Chairman from Robert A. McConnell, Assistant Attorney General. That letter (Appendix N) rejected the Chairman's proposal for the following reasons: under it, DOJ argued, it would be extraordinarily difficult to withhold access to a particular document to any committee or subcommittee of Congress if such access were made available to one Subcommittee and its staff; and, *the proposal contemplates the Executive would part with control over the information in the sensitive enforcement documents.* (Emphasis added).

The letter also included a counter-proposal, as follows:

> 1. The Subcommittee staff would be given access to all EPA enforcement files relative to the 160 hazardous waste sites in which you have an interest. Those files would remain where they are now, either at EPA headquarters or at the regional offices, respectively. Staff members would give notice, in advance, of which files were going to be examined so that EPA officials could initially examine the files to isolate those documents which were particular-

ly sensitive from an enforcement standpoint. Those documents would be removed from the files and the remaining balance of the EPA enforcement files would be made available to Subcommittee staff and ultimately to the Subcommittee, subject to some appropriate understanding regarding confidential treatment with respect to certain materials in those files. After examinng the remaining files and after having been advised what documents had been set aside from the files, and after a briefing on the general nature of the contents of such withheld materials, staff could determine whether it was, in fact, necessary, in their judgment, to examine those files.

2. Those withheld documents considered sensitive would then be analyzed by at least four persons, two in EPA and two in the Land and Natural Resources Division of the Department of Justice. One person in EPA and one of the Justice Department individuals involved in this process would be professional, career attorneys engaged in the EPA enforcement process and, at Justice, in that section of the Department responsible for enforcement of CERCLA. In addition, one EPA official and one Justice Department official responsible for examining the withheld documents would be persons holding policy level positions. The Justice Department official would be a Deputy Assistant Attorney General. If those four individuals concurred that a particular document was sufficiently sensitive that its release would adversely affect the ability of the Executive to enforce the law, that document would be considered for withholding by the Executive Branch. Thereafter, those documents would actually be withheld only if the conclusions regarding their sensitivity were concurred in by an additional member of the Department of Justice in the Office of Legal Counsel and by an attorney in the Office of Counsel to the President.

3. If the Subcommittee and its staff disagreed with the Executive Branch's position concerning the need for confidential treatment of the document in question or if it had additional reasons for why the document should be produced, those conclusions and those reasons would be articulated to the Executive Branch and the document in question would be reviewed again with those additional considerations in mind.

4. Only if the foregoing process did not lead to a resolution of the dispute with respect to the document in question would it be necessary to proceed further. At that point if the Subcommittee was not satisfied with the good faith and the legitimacy of the position of the Executive Branch, the Subcommittee would retain all rights that it presently has to pursue all lawful efforts to obtain the document in question.

This counter-proposal was rejected since it was determined to be based on the premise that the Executive Branch has the right,

through unilateral determination, to withhold any documents and information it so chooses from the Legislative Branch.

The kind of intricate and involved procedural safeguards which the DOJ proposal would have imposed on congressional access are, in the view of the Committee, more appropriate for highly sensitive national security documents, if at all, but totally unnecessary for the information sought primarily from civil enforcement files routinely developed within EPA.

For the record, the counter-proposal was received in the early evening of December 9, the night before the full Committee consideration of the issue.

Full committee consideration of the issue

On December 10, 1982, the Committee on Public Works and Transportation, by a vote of 28 to 11, with five Members voting present, adopted the following resolution, offered by Congressman Elliott H. Levitas, recommending to the House of Representatives that Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, be cited for contempt of Congress:

> *Resolved,* That the Committee on Public Works and Transportation report and refer refusal of Anne M. Gorsuch, Administrator, United States Environmental Protection Agency, to comply with the subpoena dated November 16, 1982, issued by the Subcommittee on Investigations and Oversight, together with all facts in connection therewith, to the House of Representatives with the recommendation that Administrator Gorsuch be cited for contempt of the House of Representatives to the end that she may be proceeded against in a manner and form provided by law.

Prior to taking this action, the Committee Chairman noted the following:

> It is clear that the documents which the subcommittee seeks are essential to its full operation as a subcommittee in evaluating a program that is under the basic jurisdiction of this committee; a program whose policy has been established by congressional action and enacted into law by the President; and a program which clearly mandates an agency to carry out the congressional policy.
>
> The issue here simply is whether the legislative body which passes legislation can see to it that the legislation is properly implemented and enforced as conceived. The Environmental Protection Agency has failed to comply with this mandate of the Congress and the Constitution of the United States. It has failed to turn over the essential documents that are needed for the committee and under the guise of executive privilege has determined unto itself that these documents cannot be made available to the responsible committee or subcommittee of the Congress. (Committee transcript at 5.)

IV. Authority To Conduct Oversight

The authority to conduct oversight as part of its lawmaking function is inherent in the legislative powers vested in the Congress by Article I of the Constitution. In fact, over the years, a number of Supreme court cases have not only firmly established legislative oversight as an appropriate and necessary function, but have generally interpreted the authority to be extremely broad and to include the conduct of investigations and inquiries of how government agencies are carrying out existing laws, and to search out and disclose corruption, waste and inefficiencies. (See H. Report No. 97-898, at 11, September 30, 1982).

Rules X and XI of the Standing Rules of the House of Representatives, as amended, and Rule IX of the Rules of the Committee on Public Works and Transportation (Feb. 19, 1981) mandate the authority of the Subcommittee on Investigations and Oversight to conduct legislative oversight. Pursuant to these Rules:

> The Subcommittee on Investigations and Oversight and the appropriate subcommittee with legislative authority shall cooperatively review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of the committee, and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated. In addition, the Subcommittee on Investigations and Oversight and the appropriate subcommittee with legislative authority shall cooperatively review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of the committee (whether or not any bill or resolution has been introduced with respect thereto), and shall on a continuing basis undertake future research and forecasting on matters within the jurisdiction of the committee.

In addition to this general authority, the 1980 Superfund law, under section 104(e)(2)(D), also provides:

> Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this Act shall be made available, upon written request of any duly authorized committee of Congress to such committee.

As the oversight arm of the Committee on Public Works and Transportation, the Subcommittee's jurisdiction is concurrent with that of the parent Committee, as enumerated in clause 1(p) of Rule X of the Rules of the House which includes jurisdiction on matters

pertaining to pollution of navigable waters and matters of transportation, including transportation of hazardous materials.

On the basis of that authority, various bills, both during and after formulation of the Superfund law, which provide for establishment of certain priorities in the disposal or treatment of hazardous waste; for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment; and for cleanup of inactive hazardous waste disposal sites, have been referred to the Committee, at the least on a joint referral basis, for its consideration.

V. House Rules Requirements

Committee action and vote

Pursuant to clause 2(l)(2)(A), (B) of Rule XI, the majority of the Committee having been present, the resolution was reported by a vote of 28 ayes to 11 nays, with five Members voting present.

Compliance with rule XI, clause 2(d)(3)

(1) With reference to clause 2(l)(3)(A) of Rule XI of the Rules of the House of Representatives, a separate hearing was held on the subject matter of this resolution on December 2, 1982, by the Subcommittee on Investigations and Oversight.

(2) With respect to clause 2(l)(3)(B) of Rule XI (requiring the report of any committee on a measure to include a statement required by section 308(a) of the Congressional Budget Act of 1974, if the measure provides new budget authority or new or increased tax expenditures); and clause 2(l)(3)(C) of Rule XI (requiring a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Budget Act); neither is applicable as the measure reported by the Committee is neither a bill nor joint resolution.

(3) With respect to clause 2(l)(3)(D) of Rule XI, the Committee has not received a summary of the oversight findings and recommendations made by the Committee on Government Operations under clause 4(c)(2) of Rule X.

Inflationary impact statement

With respect to clause 2(l)(4) of Rule XI (the inflationary impact on prices and costs in the operation of the national economy), no statement is required as the measure reported by the Committee is neither a bill nor joint resolution.

Changes in existing law

Clause 3 of Rule XIII (changes in existing law) is not applicable as the measure reported by the Committee is neither a bill nor a joint resolution.

APPENDICES

(In chronological order)

APPENDIX A

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., September 15, 1982.

Hon. ANNE M. GORSUCH,
Administrator,
U.S. Environmental Protection Agency, Washington, D.C.

DEAR MRS. GORSUCH: In March of this year, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation initiated a series of hearings to examine the regulation of hazardous and toxic substance releases into the environment and their effects on ground and surface water quality. As part of this review, the Subcommittee is examining the efforts being made by federal, state and local governments, and others, to carry out the provisions of the "Superfund" law, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510.

The effective conduct of this investigation will necessarily require the review of the progress being made to cleanup specific abandoned waste sites. Accordingly, this letter, in conformance with the provisions of Section 104(e)(2)(D) of P.L. 96-510, is to request that all information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency, be made available to the Subcommittee.

In that the Subcommittee's inquiry is of an ongoing nature, and can be expected to involve all activities underway in your Agency's ten regions, I recommend that you have the appropriate person on your staff contact Bob Prolman (225-3274) of the Subcommittee staff to work out the arrangements necessary to facilitate this request.

I look forward to your full cooperation and assistance in this matter.

With best wishes, I am,
Very truly yours,

ELLIOTT H. LEVITAS,
Chairman, Subcommittee on
Investigations and Oversight.

APPENDIX B

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., October 7, 1982.

Hon. ELLIOTT H. LEVITAS,
Chairman, Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN LEVITAS: I would like to express my appreciation to you and the other members of your Subcommittee and staff who met with Dr. Hernandez, John Daniel, members of my staff and me last Friday morning. I realize that your schedules were extremely crowded, particularly at that time, but I believe that the time spent was very productive.

On behalf of the Administrator, I acknowledge receipt of your letter to her of September 15, 1982, requesting that information being reported to or otherwise being obtained by this Agency, or any others acquiring such information on behalf of the Agency, within the purview of § 104(e)(2)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, be made available to the Subcommittee.

As you know, in addition to our meeting last Friday, we have had other meetings and telephone conferences with representatives of your Subcommittee in an effort to understand the general universe of information you wished to have made available, and in order that our concerns regarding the sensitivity and confidentiality of enforcement-related material in our files be expressed and understood. We believe that we have embarked on an aggressive and effective enforcement program which is producing positive environmental results, and are most concerned that nothing jeopardize that program. Our discussion with you helped alleviate our concerns.

Pursuant to our discussions, we have contacted our Regional offices in New York and Boston, which we understand to be the two which your staff will visit first. We have instructed our Regional attorneys to cooperate fully with your staff, and to make available documents or information in our files regarding the sites or facilities in which you are interested.

Internal enforcement documents which form the basis for ongoing or anticipated civil or criminal prosecutions are extremely sensitive. These documents include, for example, memoranda by Agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions, names of informants in criminal cases, and other similar material. Should you feel the need to review these documents, we would be very willing to discuss further with you the need or desirability of review of such documents, safeguards for protection of confidentiality, Agency policy

regarding release or disclosure of such material, and the effect such disclosure may have on the enforcement or prosecution of the case. I am confident that, as we continue to work with you on this matter, we will be able to satisfy your Subcommittee's need for information, while at the same time, fully protecting the internal Executive branch deliberative process associated with our execution of the law.

From our discussion, I know that you are fully aware of the sensitive nature of much of the information which will be reviewed or made available to you. For example, you will undoubtedly have access to the names of persons, firms or corporations who may, for a variety of reasons, be thought initially to have contributed hazardous substances to a site, only to find upon further investigation that the person, firm or corporation was not involved in such contribution. Any release of that information prior to its use in litigation could cause substantial damage, not only to the person, firm or corporation involved, but to the credibility of EPA's enforcement program.

You, the other Subcommittee members and your staff have all assured us that the information which you will receive or review will be treated with the utmost confidence, and will not be released to the press, the public or even to other members of Congress until the Agency has advised you in writing that such release would not jeopardize our enforcement efforts. I sincerely appreciate those assurances, which are being relied upon most heavily by us as the basis for our agreement.

Some of the documents in our files may be entitled to protection under 18 USC § 1905, and improper disclosure of such documents can result in criminal penalties under that statute and §104(e)(2(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. We will endeavor to identify such documents at the time they are made available, but your staff should also be aware of the potential consequences of improper disclosure of such material.

I believe that it is important to maintain close communications between your Subcommittee and the Agency regarding any issue which might arise regarding your request. Should your staff need to discuss any problem which arises, please have them contact Richard Mays, Special Assistant to the Enforcement Counsel, whose number is FTS 382-4146. Of course, I hope that you will call me directly if I can be of service.

Sincerely,

ROBERT M. PERRY,
Associate Administrator
and General Counsel.

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APPENDIX C

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., October 12, 1982.

Hon. ELLIOTT H. LEVITAS,
Chairman, Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your staff has expressed concern regarding the interpretation of the third paragraph of my letter to you of October 7, and I have met with your staff to discuss those concerns.

It was our intent in that paragraph that only those documents or other information which are designated as being sensitive from an enforcement perspective be treated as confidential. In addition, we understand that the information designated as confidential will not be revealed to the press or the public unless it has been ascertained that such release will not jeopardize our enforcement efforts. Normally, we will communicate our approval for release of such information in writing. We also understand that information designated as confidential may be disclosed to other members of Congress, but that you will assure that such disclosure shall be subject to this continuing agreement of confidentiality.

I believe that this explanation satisfied the concerns of your staff. If I can be of further assistance in your investigation, please do not hesitate to call.

Sincerely,

ROBERT M. PERRY,
Associate Administrator
and General Counsel.

APPENDIX D

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., November 15, 1982.

Memorandum to: OLEC Personnel.
Subject: Congressional Access to Sensitive Enforcement Documents.
From: Robert M. Perry, Associate Administrator and General Counsel.

This memorandum provides my interim policy as to how you should respond to requests for information from Congressional committees and subcommittees with respect to EPA's enforcement of the laws we administer. I want to begin by emphasizing that we will cooperate with these committees and their staffs to the maximum extent possible so long as such cooperation does not impair potential or on-going litigation.

After careful and considered deliberation within EPA and with the Department of Justice it has been decided that certain classes of deliberative or negotiating materials relating to the enforcement of EPA laws and regulations will not be made available to Congressional committees without first being screened by me or my designated representatives.

When you are dealing with congressional staff members and a request is made for access to or production of documents you should take the following steps:

1. Immediately notify Richard Mays at 382-4146.

2. Examine the documents to determine whether they contain deliberative or negotiating material, the public exposure of which would endanger the enforcement efforts of EPA in a matter being developed for or in litigation. In closed cases you should determine if the documents contain information which would disclose the Agency's position in other, active cases. The types of documents with which we are concerned have to do with "enforcement sensitive" information. For example, documents that analyze the weaknesses of our case or our position on a factual or legal issue, set forth our negotiating or litigating position or strategy, contain "bottom line" or "fall back" positions, or otherwise contain materials that, if made public, could impede our enforcement efforts. These documents need not fall into the classic attorney-client or attorney-work product categories.

3. All requested materials that contain such "enforcement sensitive" information should be isolated and forwarded to me for review. We will carefully analyze these materials in consultation with the Department of Justice and then inform you of our decision.

Individual congressional staff members may attempt to offer personal or "committee" assurances as to the confidentiality of the material sought. However, such assurances may be beyond the au-

thority of the staff members under the Rules of Congress, therefore until such time as formal procedures may be developed between EPA and the committees concerned, the procedure described above will be used. No one is authorized to disclose any "enforcement sensitive" material, either for on-site review or for copying, unless permission is given by me.

APPENDIX E

[Original]

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To: Robert S. Prolman and/or Sante J. Esposito.

You are hereby commanded to summon Anne M. Gorsuch, Administrator, United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 to be and appear before the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives of the United States, of which the Hon. Elliott H. Levitas is chairman, and to produce all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," in their chamber in the city of Washington, on December 2, 1982, at the hour of 10 a.m. then and there to testify touching matters of inquiry committed to said Committee; and she is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 16th day of November 1982.

JAMES J. HOWARD, *Chairman.*

Attest:

EDMUND L. HENSHAW, JR., *Clerk.*

[Original]

Subpena for Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency before the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee.

Served November 22, 1982.

R. S. PROLMAN.

APPENDIX F

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., November 24, 1982.

Memorandum from: Regional Administrators.
Subject: Response to Congressional Subpoena.
To: Assistant Administrator for Solid Waste and Emergency Response.

On November 22, 1982, the U.S. House Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee served me with the attached Subpoena commanding me to appear before the Subcommittee at 10:00 a.m. on December 2, 1982. The Subpoena further directs me to produce the following

". . . all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the 'Comprehensive Environmental Response, Compensation, and Liability Act of 1980.' "

It is the policy of this Administration to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. However, the Department of Justice (DOJ) has advised us that certain classes of deliberative or negotiating materials must be reviewed very closely before being made available to Congressional committees. Included among these categories of documents are "enforcement sensitive" materials, the release of which would compromise or endanger the enforcement efforts of EPA in a matter being developed for or in litigation. Such materials must be reviewed by Headquarters' Office of Legal and Enforcement Counsel before their release to Congressional committees.

With these policy considerations in mind, I am hereby instructing you to take the following steps:

1. Gather all of the documents encompassed in the Subcommittee's Subpoena.

2. In consultation with legal counsel, segregate all materials which are "enforcement sensitive." For guidance on what documents are included in this classification, please consult the attached memorandum from Robert M. Perry to all OLEC personnel dated November 15, 1982.

3. Assign one individual in your office to coordinate the production of these documents with Headquarters' coordinators Kirk Sniff (382-4539) and Steven Leifer (382-4548).

4. Carefully document all personnel, copying, shipping and other cost associated with producing these documents.

5. As soon as you have assembled the documents, begin duplication of the documents and make preparation for their shipment to Headquarters. "Enforcement sensitive" documents must be clearly marked and separated.

6. This effort should receive priority within the normal resource constraints of your area of responsibility. However, you should not use overtime or holiday pay, contractors or express shipping to assemble, process, transmit or copy these documents.

Thank you for your cooperation and assistance.

ANNE M. GORSUCH.

APPENDIX G

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 30, 1982.

Hon. ELLIOTT H. LEVITAS,
Chairman, Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have had occasion to reiterate, in the attached letter to Chairman Dingell of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, the historic position of the Executive Branch that it is not in the public interest for sensitive documents found in open law enforcement files to be given to Congress or its committees except in extraordinary circumstances. I am aware that your Subcommittee has issued to Administrator Gorsuch of the Environmental Protection Agency ("EPA") a subpoena apparently seeking copies of some 787,000 documents found in open law enforcement files related to approximately 160 hazardous waste sites located throughout the United States. At least 23 and probably more documents covered in your Subcommittee's subpoena are of that class covered by my letter to Chairman Dingell, since they reflect prosecutorial strategy and other internal deliberations regarding prosecution of the particular cases involved.

Because the principles articulated in the attached letter to Chairman Dingell are fully applicable to some of the documents arguably within the scope of your Subcommittee's subpoena, I believe it appropriate to provide you with a copy of that letter at this time. Because neither I nor my staff have previously communicated directly with you on this particular matter, I would also like to express my hope that, after you have had the benefit of my views on this issue, set in their historical perspective, you will no longer seek to compel production of this class of documents from the Administrator. Should you wish to discuss this matter further prior to the Subcommittee's scheduled December 2 hearing, I would ask that you contact Assistant Attorney General McConnell of my Office of Legislative Affairs at your convenience.

I would also add that I am confident that the legislative needs of your Subcommittee can be met without the production by the Administrator of sensitive documents in open law enforcement files. That is certainly the lesson that history teaches, and I believe you will agree that it is incumbent on both of our Branches to avoid constitutional confrontations so long as the needs and prerogatives of each Branch can be harmonized.

Sincerely,

WILLIAM FRENCH SMITH,
Attorney General.

APPENDIX H

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C., November 30, 1982.

Hon. JOHN D. DINGELL,
Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless, it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstamces. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

"It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.

"Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

"The Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case. . . ." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

"I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

"[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination *to* the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, Members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents."

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee, would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and *all Members of the House shall have access thereto. . . .*" In order to avoid the re-

quirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public.[1] To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (*see Senate Select Committee* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately " 'to say what the law is' with respect to the claim of privilege presented in [any particular] case." *United States* v. *Nixon*, 418 U.S. at 705, *quoting Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensi-

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[1] Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in *United States* v. *Nixon*, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under *United States* v. *Nixon* would be identical even if the Court had itself not used the word "public" in the relevant passage.

tive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination.[2]

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

In closing, I emphasize that we have carefully reexamined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

WILLIAM FRENCH SMITH,
Attorney General.

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[2] It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

APPENDIX I

THE WHITE HOUSE,
Washington, November 30, 1982.

MEMORANDUM FOR THE ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Subject: Congressional Subpoenas for Executive Branch Documents.

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch,

with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

RONALD REAGAN.

APPENDIX J

SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT, COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

Memorandum to: Members, Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation
From: Elliott H. Levitas, Chairman, Subcommittee on Investigations and Oversight
Subject: Subpoena of EPA Administrator and for records.

On Monday, November 22, 1982, the Committee on Public Works and Transportation issued a subpoena to U.S. Evironmental Protection Agency (EPA) Administrator, Anne M. Gorsuch, to appear before the Subcommittee on Investigations and Oversight on Thursday, December 2, 1982, and to provide the subcommittee with certain documents critical and necessary to the subcommittee's ongoing review of the 1980 "Superfund" law, for cleaning up abandoned hazardous waste sites and responding to hazardous chemical spills. The issuance of the subpoena was required due to the EPA's refusal to make available to the subcommittee information and material documenting how the Agency is carrying out certain of its enforcement and cleanup mandates under the Superfund statute.

The subcommittee's review of the implementation of the Superfund law is part of a broader ongoing inquiry into the problem of hazardous waste contamination of water resources. The following paragraphs briefly summarize the subcommittee's review of this matter, the role of the Superfund law, issues of concern with respect to that statute, the events necessitating the issuance of the subpoena, and the subcommittee's authority to act.

BACKGROUND

Hazardous waste contamination of water resources and the "Superfund" law.

For the past several months, the subcommittee has been examining the problem of contamination of the nation's ground and surface water resources by hazardous wastes that have been improperly and often illegally spilled or disposed in thousands of abandoned or inoperative sites all across the country, many of them similar to "Love Canal" and "Valley of the Drums." To date, federal and state efforts to locate these sites have identified about 9500 actual or potentially hazardous situations.

The "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," commonly known as the "Superfund" law, is the primary federal statute to address the abandoned waste site problem. (Emergency responses to hazardous chemical spills are also addressed under the act.) U.S. Environmental Protection

Agency is the federal agency that has been charged with the responsibility for carrying out the Superfund Act.

Signed into law on December 11, 1980, the Superfund statute created a $1.6 billion trust fund, to be collected over a five-year period commencing in 1981, and used for cleaning up hazardous waste sites and spills of hazardous chemicals. The monies for the Fund are derived primarily from taxes on oil and certain chemicals; 12.5 percent of the Fund's monies come from general tax revenues.

Among the key features of the Superfund Act is the granting of authority to the government to act to control and/or eliminate a hazardous situation when a responsible party cannot act, or cannot be identified in a timely enough fashion.

Another significant feature is the law's liability provisions. Essentially, those responsible for creating a hazardous waste site (or chemical spill), be they chemical waste generators, transporters, treaters, storers, or disposers, who do not act to clean up a site themselves, are required to reimburse the Fund for the government costs of cleaning it up and for any damage to natural resources. Further, the Government can assess *treble* damages against responsible parties that refuse to cooperate in cleaning up a site.

In addition to the Superfund law, there are three other federal laws that address chemical pollution problems in whole or in part, that are included in the subcommittee's review:

(1) The 1972 Federal Water Pollution Control Act Amendments, P.L. 92-500, as amended (also referred to as the Clean Water Act);

(2) The Hazardous Materials Transportation Act, P.L. 93-633, as amended; and

(3) The Resource Conservation and Recovery Act, P.L. 94-580, as amended (RCRA).

What the subcommittee is attempting to assess with respect to the Superfund law

The Congress must consider whether there is a need to continue the Superfund program in its present form, and whether there is a need to continue, or alter the tax on petroleum and other chemicals that are the source of revenues for the Fund. The ability to make informed decisions on these legislative matters will of necessity require an assessment and evaluation of the EPA's administration of the Fund and its efforts to execute its responsibilities as mandated by the statute.

This in turn will require an assessment of (1) the number of sites and rate of cleanup that EPA is achieving under the program, and the portion of the total problem that can be expected to be addressed; (2) the type, degree (partial or total) and cost of the clean up of the individual sites; and (3) the extent to which the EPA is utilizing its enforcement authorities under the act to obtain and/or recover the costs of cleaning up a waste site from the responsible parties, thereby replenishing the Fund and extending its coverage.

EPA's efforts to carry out its enforcement authorities in order to maintain or replenish the Fund is also of particular importance with respect to the government's ability to respond to hazardous chemical spills. The cost of cleaning up such spills must also be paid for by the Fund, absent a capable, responsible party. Conse-

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quently, to the extent that the Fund is not replenished, the government's capability to respond to hazardous chemical spills will be diminished.

The Superfund statute provides the EPA with considerable discretion whether to use the fund to clean up an abandoned waste site and recover the government's costs later, or to negotiate with the responsible party(ies) first. (The Agency is attempting to do both simultaneously, with questionable success.) The EPA must also make decisions in each case whether to move quickly or slowly, to seek treble damages, or to pursue civil or criminal litigation against responsible parties. Similarly, the Agency can "accept" settlement offers for less than the total cost of cleanup from responsible parties, and even limit future liability of an involved party as part of such settlements.

These and numerous other enforcement decisions being made by the EPA will have a significant bearing on how much cleanup is taking place, who is paying for it, and the extent to which the Fund is being maintained or replenished.

EPA's ability to make such decisions is obviously dependent on and influenced by the extent to which necessary information and data about a site and its responsible parties are available to the Agency's regulators and the way that that information is used, or the extent to which it is even considered in deciding how to proceed in each case. Consequently, in analyzing the effectiveness of the statute and the EPA's execution of its responsibilities, the subcommittee must necessarily be concerned with the efforts being made by the Agency to make such information available to its regulators and other involved staff, and the way and extent to which such information is actually being used.

Information being sought by the subcommittee

In carrying out this type of oversight effort, the subcommittee must have the ability to review and acquire copies of relevant documents. In this instance, this includes (1) regulations, guidance, and program management documents; (2) information pertaining to litigation on the regulations; (3) technical studies and reports and their support data and materials; and (4) enforcement strategy and decision correspondence, memorandums, etc., and agency interpretations of their legal authority to act.

EPA has generally provided the subcommittee access to, and made available copies of materials in the first three categories. *They have, with very limited exceptions, refused the subcommittee access to and copies of materials from the fourth, enforcement related, category.*

Additionally, EPA officials have repeatedly refused the subcommittee access to, and copies of documents concerning their enforcement efforts on Superfund site cleanup cases that have been totally or partially settled, as well as those that have not. Involved are the 160 sites listed to date by the EPA as designated priorities, pursuant to Section 105(8)(B) of the Superfund statute. (List attached.)

Among the documents being withheld by the EPA are settlement proposals, enforcement strategies, statements of the government's legal positions, evaluations or analyses of sites and cases that would identify what information is, or is not being considered with

respect to how the government should, and has proceeded in various instances, and lists of potential or suspected "responsible parties."

Absent this type of information, the subcommittee will not be able to carry out its review of the Superfund law.

Summary of events leading to the subpoena

March 10, 1982.—The subcommittee held the first of its public hearings on the matter of hazardous waste contamination of water resources. EPA officials testified concerning their lifting of a ban on the disposal of liquid wastes in landfills.

March 30, 1982.—The subcommittee held another day of hearings to receive further testimony from EPA officials on the suspension of the liquid waste disposal ban, and the extent to which the action would contribute to water pollution problems in the future.

July 9, 1982.—The subcommittee held a field hearing in New York City to receive testimony from local government officials representatives of citizen groups, and officials from the U.S General Accounting Office concerning the progress being made in cleaning up hazardous waste sites under Superfund law.

September 13, 1982.—The subcommittee staff contacted EPA-Region II (New York) legal and program enforcement staff to advise of the subcommittee's need and intent to examine files pertaining to certain Superfund cases. EPA-Region II staff advised the subcommittee staff that clearance to see enforcement related information would have to be sought from EPA headquarters Office of Legal and Enforcement Counsel.

September 14, 1982.—The subcommittee staff phoned the EPA headquarters Office of Legal and Enforcement Counsel, and advised them of the subcommittee's intentions to review EPA-Region II Superfund files. Prior to the close of business, the subcommittee staff was advised by EPA Office of Legal and Enforcement Counsel staff, by phone, that the subcommittee could have access to the Agency's files, but that the confidentiality of the material would have to be maintained. The subcommittee staff agreed to protect the confidentiality of all sensitive materials.

September 15, 1982.—The subcommittee staff traveled to the EPA-Region II (New York) offices, whereupon they were advised (by both EPA regional and headquarters legal staff) that prior clearances to the material were being rescinded, and that no access to any of the enforcement related information would be provided. Further, the EPA headquarters Office of Legal and Enforcement Counsel staff advised the subcommittee staff that a formal letter of request to see Superfund files was required, pursuant to Section 104(e)(2)(D) of the Superfund statute.

September 16, 1982.—A letter from the subcommittee chairman to the EPA Administrator, requesting access to Superfund program files and information, was hand-delivered to EPA headquarters. The subcommittee staff still present in New York, again, formally requested access to the Superfund enforcement related files, and were denied access by both EPA-Region II legal enforcement personnel and EPA headquarters Office of Legal and Enforcement Counsel staff.

September 20, 1982.—EPA Associate Administrator and General Counsel, Robert Perry, phoned the subcommittee staff to suggest that he send one of his legal staff to accompany the subcommittee staff to *pre-screen the Agency's files and remove sensitive documents.* The subcommittee staff advised that this was unacceptable, as it would obviously preclude the subcommittee access to the information and materials it was seeking to review and copy.

September 29, 1982.—At EPA's request, the subcommittee staff met with both EPA headquarters Office of Legal and Enforcement staff, including Mr. Perry, and with officials of the Department of Justice (DOJ), to discuss the subcommittee's request to access Superfund enforcement files. EPA officials deferred to the DOJ officials present, who advised the subcommittee that it was their opinion that the subcommittee did *not* have the authority to review the EPA's Superfund program enforcement related files.

September 30, 1982.—The subcommittee met in executive session and authorized the issuance of a subpoena to the EPA Administrator, and other Agency officials as necessary, and for documents, if EPA refuses the subcommittee access.

October 1, 1982.—EPA Deputy Administrator, John Hernandez, General Counsel Robert Perry, and other EPA staff met with the Subcommittee's Chairman, Ranking Minority Member and Congressman Molinari, and subcommittee staff at Dr. Hernandez's request. The EPA officials present assured the subcommittee that they would cooperate and provide access to, and copies of pertinent Superfund enforcement related files, and that they would so indicate in a response to the subcommittee Chairman's earlier letter to the Administrator. In response to questions by the EPA officials present, the subcommittee members assured that the confidentiality of the Agency's sensitive materials would be maintained.

October 7, 1982.—The subcommittee received a response to the Chairman's letter to the EPA Administrator, signed by EPA Associate Administrator and General Counsel, Robert Perry, advising that the Agency would make their files available to the subcommittee, *with the exception of enforcement related material.*

October 8, 1982.—The subcommittee staff met with Mr. Perry and his staff at EPA headquarters to clarify the above mentioned letter's exception and certain other statements in the letter. Mr. Perry advised that he would send an additional letter clarifying the points of concern, and that the subcommittee would have access to the information it desired.

October 12, 1982.—The above referenced follow-up letter from EPA, signed by Mr. Perry, was received by the subcommittee. The letter did *not* clarify or eliminate the enforcement-related information access exception noted in Mr. Perry's October 7 letter.

October 13-15, 1982.—The subcommittee staff traveled to EPA Regions I and II (Boston and New York) to review certain Superfund site enforcement related cases, and obtained a limited number of confidential documents concerning certain of the cases, but were advised that many of the decisions relative to enforcement actions were made by headquarters personnel, and that the records pertaining to those matters were at EPA headquarters.

October 29, 1982.—The subcommittee staff met with EPA headquarters Superfund program enforcement staff, and asked to see

the enforcement files of certain cases. The EPA program officials *refused to provide access to the information,* and referred subcommittee staff to the Office of Legal and Enforcement Counsel.

The subcommittee staff then met with EPA Deputy General Counsel, Michael Brown, and with Mr. Stephen Ramsey of the Justice Department, and Mr. Richard Mays, also of EPA, and again, requested access to the Agency's files, specifically with respect to certain cases. Mr. Brown advised us that, due to the issuance of a subpoena to the EPA Administrator by the House Energy and Commerce Committee, which was also seeking access to some of the Superfund enforcement files, the Agency was *not* going to provide the subcommittee with access to, or copies of Superfund related enforcement files and documents. Both Mr. Brown and Mr. Ramsey advised that they felt that the subcommittee did *not* have the authority to see this information. Mr. Brown further advised that he felt it would be more appropriate if the subcommittee would wait until the Agency had finished its work before conducting a review.

November 22, 1982.—The Committee on Public Works and Transportation issued a subpoena to EPA Administrator, Anne M. Gorsuch, to appear before the Subcommittee on Investigations and Oversight on December 2, 1982, and to produce all of the pertinent enforcement related documents concerning the designated 160 Superfund cleanup sites.

November 24, 1982.—A national news wire service reporter called the subcommittee offices at approximately 4:30 p.m. and advised the subcommittee staff that he had obtained a copy of the subpoena. As the subcommittee had made no release or distribution of the subpoena, its release apparently stemmed from the EPA or another Executive Branch entity.

November 30, 1982.—At 5:30 p.m., a national news wire service reporter called the subcommittee offices and, after reading from a letter to the subcommittee chairman from the U.S. Attorney General concerning the subcommittee's subpoena, asked for comment, which was declined because the letter had not been received by the subcommittee.

At 7:40 p.m., the Justice Department delivered the above letter to the Chairman.

Authority to conduct oversight

The authority to conduct oversight as part of its lawmaking function is inherent in the legislative powers vested in the Congress by Article I of the Constitution. In fact, over the years, a number of Supreme Court cases have not only firmly established legislative oversight as an appropriate and necessary function, but have generally interpreted the authority to be extremely broad and to include the conduct of investigations and inquiries of how government agencies are carrying out existing laws, and to search out and disclose corruption, waste and inefficiencies.

The subcommittee's authority to conduct oversight is set forth by Rules X and XI of the House of Representatives, and Rule IX of the Rules of the Committee on Public Works and Transportation. Pursuant to these rules:

> The Subcommittee on Investigations and Oversight and the appropriate subcommittee with legislative authority shall cooperatively review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of the committee, and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated. In addition, the Subcommittee on Investigations and Oversight and the appropriate subcommittee with legislative authority shall cooperatively review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of the committee (whether or not any bill or resolution has been introduced with respect thereto), and shall on a continuing basis undertake future research and forecasting on matters within the jurisdiction of the committee.

In addition to this general authority, the 1980 Superfund law, under Section 104(e)(2)(D) also provides:

> Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this Act shall be made available, upon written request of any duly authorized committee of Congress to such committee.

As noted in the preceding chronology of events leading to the issuance of the subpoena, the subcommittee hand delivered a letter making the above request to the EPA Administrator on September 16, 1982. The Agency's responses, dated October 7, and 12, 1982, excluded access to enforcement related documents.

EPA's and the Department of Justice apparent reasoning behind their refusal to provide access

EPA has raised claims of Executive Privilege as the legal basis for withholding their enforcement related files from the Subcommittee. A more detailed discussion of this matter is contained in the November 30, 1982 letter to the subcommittee chairman from Attorney General Smith.

CERCIA INTERIM PRIORITY LIST

State and site name

WA—Commencement Bay.
NH—Keefe Environmental Services.
NJ—Lipari Landfill.
MA—Mark Phillip Trust (Woburn).
PA—McAdoo Associates.

MA—Nyanza Chemical Waste Dump.
NY—Pollution Abatement Services.
NJ—Price Landfill.
OK—Tar Creek.
DE—Tybouts Corners.
FL—Biscayne Aquifer (Northwest 58th Street Landfill, Miami Drum, Varsol Spill).
PA—Bruin Lagoon.
NJ—Burnt Fly Bog.
DE—Delaware Sand and Gravel—Llangollen Army Creek Landfill.
NJ—Goose Farm.
NJ—Lone Pine Landfill.
TX—Motco.
NJ—Pijack Farm.
NJ—Spence Farm.
AR—Vertac, Inc.
NJ—Bridgeport Rental and Oil Services.
NJ—D'Imperio Property.
TX—French Limited Disposal Site.
NY—Love Canal.
NY—Old Bethpage Landfill.
FL—Picketville Road Landfill.
FL—Reeves Southeastern Corporation.
IN—Seymour Recycling Corporation.
TX—Sikes Disposal Pits.
SC—South Carolina Recycling and Disposal Co. (Bluff Road).
CA—Aerojet/General Corporation.
FL—American Creosote Works.
MA—Charles George Land Reclamation Trust.
CA—Iron Mountain Mines, Inc.
NJ—Kin Buc Landfill.
MN—Oakdale Dump Sites.
NY—Olean Well Fields.
RI—Picillo Farm Site.
DE—Stauffer Chemical.
FL—Taylor Road Landfill.
MN—Andover Sites.
FL—Broward County Solid Waste Disposal Facility.
PA—Butler Tunnel.
NY—Facet Enterprises, Inc.
MO—Fulbright Landfill.
NH—Ottati & Goss/Kingston Steel Drum.
FL—Pioneer Sand Company.
FL—Timber Lake Battery Disposal.
FL—Whitehouse Waste Oil Pits.
SD—Whitewood Creek.
OH—Chem-Dyne Corporation.
NJ—Chemical Control.
FL—Coleman-Evans Wood Preserving Company.
RI—Davis Liquid Chemical Waste Disposal Site.
AR—Fritt Industries.
FL—Hollingsworth Solderless Terminal Company.
CT—Laurel Park Landfill.

MA—Re-Solve, Inc.
MN—Reilly Tar and Chemical Corp.
CA—Stringfellow Acid Pits.
AR—Allen Transformer.
FL—Alpha Chemical Corp.
OH—Fields Brook.
MN—Koppers Gas and Coke Plant.
AR—Mid-South Wood Products.
IN—Neal's Landfill.
NM—United Nuclear Corporation.
NJ—Upper Freehold.
FL—Zellwood Ground Water Contamination Site.
AZ—19th Avenue Landfill.
KY—A.L. Taylor Site ("Valley of the Drums").
NY—Batavia Landfill.
FL—Gold Coast Oil Corporation.
NM—Homestake Mining.
PA—Hranica Landfill.
PA—Lord-Shope Landfill.
MN—National Lead-Taracorp Site.
IL—Outboard Marine Corporation.
FL—Sapp Battery Salvage.
FL—Tower Chemical Company.
PA—ABM Wade.
MO—Ellisville Area Sites.
OH—Chemicals and Minerals Reclamation.
MI—Gratiot County Landfill.
PA—Lehigh Electric and Engineering Company.
NY—Marathon Battery Corporation.
VA—Mathews Electroplating.
NH—Sylvester's.
WV—West Virginia Ordnance Site.
RI—Western Sand and Gravel Site.
NM—AT&SF Railroad (Clovis).
TX—Bioecology Systems, Inc.
VA—Chisman Creek Disposal.
OK—Criner Waste Disposal Site.
CO—Denver Radium Sites.
PA—Lindane Dump.
NY—Niagara County Refuse Site.
OH—Summit National Liquid Disposal Services.
AL—Triana (Redstone Arensal).
ME—Winthrop Town Landfill.
IA—Aidex Corporation.
KS—Arkansas City Dump Site.
ND—Arsenic Trioxide Disposal Site.
MD—Chemical Metals Industries, Inc.
DC—Fort Lincoln Barrel Site.
GA—Luminous Processes, Inc.
TN—North Hollywood Dump.
GU—Ordot Landfill.
TTP—PCB Disposal.
NC—PCB Spills in North Carolina.
NMI--PCB Warehouse.

VT—Pine Street Canal.
UT—Rose Park.
AS—Taputimu Farm.
MS—Walcotte Chemical Company.

ADDITIONAL SUPERFUND PRIORITY SITES

State and site name

AZ—Glove.
AZ—Tucson Airport.
CO—Central City.
CO—Marshall L/F.
CO—Woodbury Chemical.
DE—Harvey & Knott L/F.
IL—A & F Greenup.
IL—ACME Solvents.
IL—Wauconda Sand & Gravel.
KY—Distler Farm.
KY—Lee's Lane L/F.
LA—Bayou Sorrel.
LA—Old Inger.
MA—New Bedford.
MA—Silresim.
MI—Berlin & Farro.
MI—Rose Township Dump.
MI—G & H Landfill.
MI—Liquid Disposal.
MI—Northernaire Plating.
MI—OTT/Story.
MI—Verona Well Field.
MN—Burlington Northern.
MN—FMC Corp.
MN—LeHillier.
MN—New Brighton.
MN—Waste Disposal Eng.
MS—Plastifax Inc.
NJ—Gloucester Env.
NJ—Helen Kramer L/F.
NJ—Krysowaty Farm.
NJ—Swope Oil.
NJ—Syncon Resins.
NM—South Valley.
NY—Kentucky Avenue Wellfield.
NY—Sinclair Refining.
NY—York Oil.
OH—Laskin/Poplar.
PA—Drake Chemical.
PA—Osborne Dump.
SC—SCRDI Dixiana.
TX—Crystal Chemical, Houston, Tx. (157).
TX—Harris Site, Houston (158).
TX—Highlands Acid Pits (159).
WA—Western Processing Co. Inc., Kent (160).

APPENDIX K

LIST OF ENFORCEMENT-SENSITIVE DOCUMENTS WITHHELD FROM LEVITAS SUBCOMMITTEE

1. Memorandum dated September 2, 1982, from Jackson L. Fox, Attorney, Environmental Enforcement Section, Department of Justice, to Stephen D. Ramsey, Chief, Environmental Enforcement Section, DOJ, entitled "Litigation Strategy—*U.S. v. Hooker Chemical and Plastics Corp. et al.* (Love Canal)".

2. Memorandum dated November 10, 1982, from William J. Walsh and John H. Wheeler, Attorney-Advisors, Office of Enforcement Counsel, EPA, to R. Charles Morgan, Chief Technical Coordinator, Love Canal Litigation, Office of Waste Programs Enforcement, EPA, entitled "Initial List of Love Canal Technical Tasks".

3. Memorandum (undated) from Jim Dragna, Attorney-Advisor, Office of Enforcement Counsel, EPA, to Edward A. Kurent, Associate Enforcement Counsel-Waste, Office of Enforcement Counsel, EPA, entitled "Chem-Dyne Settlement".

4. Memorandum (undated) from Robert B. Schaefer, Regional Counsel, Region V, EPA, and Edward Kurent, Associate Enforcement Counsel-Waste, to Michael A. Brown, Enforcement Counsel, EPA, entitled "Treatment of Non-Settling Responsible Parties at the Chem-Dyne Site".

5. Memorandum dated November 4, 1982, from Edward Kurent, Associate Enforcement Counsel-Waste, Office of Enforcement Counsel, EPA, to Michael A. Brown, Enforcement Counsel, EPA, entitled *"United States v. Solvents Recovery Service of New England,* (Civil No. H–79–704, D. Conn.)

6. Memorandum dated September 2, 1982, from Mitchell E. Burack, Attorney-Advisor, OLEC, to Ed Kurent, Associate Enforcement Counsel, entitled "Seymour Recycling".

7. Document dated September 28, 1982, entitled "Litigation Report—American Surplus Sales Company".

8. Memorandum dated July 15, 1982, from Dick Whittington, P.E., Regional Administrator, Region VI, EPA, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, EPA, entitled "Crystal Chemical Co., Houston, Texas; Cost Recovery Action Under Section 107(a) of CERCLA".

9. Memorandum dated May 27, 1982, from J. Howard Beard, III, Environmental Scientist, Office of Waste Programs Enforcement, and Jim Kohanek, Attorney, Office of Legal and Enforcement Counsel, to The Record, entitled "Meeting with the Owner/Operator of Lenoir Refining Company", together with a Routing and Transmittal Slip to Jim Kohanek dated May 13, 1982, with attached listing of drums.

10. Memorandum dated October 28, 1982, from Barbara L. Peterson, Attorney, Office of Regional Counsel, Region VII, EPA, to

James Kohanek, Attorney, Office of Legal and Enforcement Counsel, entitled "Responsible Parties-Callahan Site", with attached listing of drums.

11. Draft (undated) of a memorandum from James D. Bunting, Acting Deputy Associate Enforcement Counsel, through Peter Broccoletti, Deputy Associate Enforcement Counsel, to William A. Sullivan, Jr., Enforcement Counsel, entitled "General Disposal Site, Santa Fe Springs, California (Inmont)".

12. Memorandum dated August 3, 1982, from Edward A. Kurent, Acting Associate Enforcement Counsel-Waste, through Michael A. Brown, Acting Enforcement Counsel, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, entitled "Potential Settlement of *U.S. v. Burns, et al.* Civil Action No. 80–1424 (W.D. Pa., filed Oct. 3, 1980)".

13. Memorandum dated May 21, 1982, from Michael A. Brown, Acting Enforcement Counsel, to William N. Hedeman, Director, Office of Emergency and Remedial Response, entitled "Superfund Spending Authorization—Miami Drum Services Company Site (Dade County, Florida)".

14. Letter dated September 3, 1982, to Ed Kurent, Acting Associate Enforcement Counsel-Waste, Office of Legal and Enforcement Counsel, EPA, from Lloyd S. Guerci, Assistant Chief, Environmental Enforcement Section, Department of Justice, regarding *U.S. et al v. County* of Hillsboro ("Taylor Road"): Technical Support for Trial Preparation.

15. Memorandum dated October 25, 1982, from Edward A. Kurent, Acting Associate Enforcement Counsel, through Michael A. Brown, Acting Enforcement Counsel, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, entitled "Status of Outboard Marine Corporation (OMC), Waukegan, IL".

16. Memorandum dated November 8, 1982, from Robert Van Heuvelen, Attorney, Department of Justice, to Stephen D. Ramsey, Chief, Environmental Enforcement Section, et al, entitled "Resolution of Generator Cases Where Less Than Full Cleanup Is Committed by Responsible Parties".

17. Memorandum dated August 20, 1982, from Dick Emory, attorney, Office of Legal and Enforcement Counsel, EPA, to Mary Douglas Dick, Attorney-Advisor, entitled "Denver Radium Sites; Liability of Present Landowners".

18. Memorandum dated November 15, 1982, from Dick Emory, attorney, Office of Legal and Enforcement Counsel, EPA, to Ed Kurent and Fred Stiehl, Acting Associate Enforcement Counsel-Waste, respectively, entitled, "Accelerating the RI and the FS, and Reconsidering the Role of Cost-Effectiveness".

19. Memorandum dated November 16, 1982, from M. Elizabeth Cox, Attorney/Advisor, Office of Enforcement Counsel, to Edward A. Kurent, Associate Enforcement Counsel-Waste, entitled "Homesteak Mining Co., Milan, N.M.".

20. Four (4) related letters/memoranda related to Raser Tannery, Inc., a case referred to EPA Headquarters from Region V, described as follows:

(a) Letter dated May 14, 1982, from Steven R. Baer, Attorney, Environmental Enforcement Section, DOJ, to James Bunting, Deputy Enforcement Counsel, EPA;

(b) Memorandum dated August 30, 1982, from Helen Keplinger, Attorney-Advisor, Office of Enforcement Counsel—Waste, to the File, entitled "Region V Meeting (7-22-82)—Raser Tannery, Ashtabula, OH".

(c) Letter dated September 1, 1982, from Eric P. Dunham, Assistant Regional Counsel, EPA Region V, to Helen Keplinger, Office of Enforcement Counsel, EPA, on Raser Tannery.

(d) Letter dated October 21, 1982, from Pierre Talbert, Assistant Regional Counsel, EPA Region V, to Helen Keplinger.

21. Memorandum dated December 15, 1981, from Julio Morales-Sanchez, Director of Enforcement Division, EPA Region II, to Christopher Capper, Assistant Administrator for Solid Waste and Emergency Response, EPA, and William Sullivan, Enforcement Counsel, EPA, entitled "Discussion of Settlement in Price's Landfill Case: Joint and Several Liability".

22. Memorandum dated August 17, 1982, from Regional Counsel, Region IV, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, EPA, entitled "PCB Roadside Spill Sites, North Carolina, Settlement Proposal of Robert Earl Ward, Jr.".

23. Document dated August 6, 1982, entitled "Evidence Concerning Disposal by ICI Americas, Inc., at Tybouts Corner. *United States* v. *New Castle County et al.*, Civ. No. 80-489 (D. Del.). (Supplement to Prior Memorandum Concerning Third Party Generators)". Distribution of this document is also restricted by order of the U.S. District Court.

APPENDIX L

CONTEMPT RESOLUTION REPORTED BY SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

Be it resolved that the subcommittee finds Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, in contempt for failure to comply with the subpoena ordered by this subcommittee and dated November 16, 1982, and the facts of this failure be reported by the Chairman of the Subcommittee on Investigations and Oversight to the Committee on Public Works and Transportation for such action as that Committee deems appropriate.

APPENDIX M

OFFICE OF THE CLERK,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., December 8, 1982.

Re Attorney General's Letter Concerning Subpoena For Documents to Administrator of Environmental Protection Agency.

To: Honorable Elliott H. Levitas, Chairman, Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation.

From: Stanley M. Brand, General Counsel to the Clerk.

This memorandum responds to the assertions made in the Attorney General's letter of November 30, 1982 concerning a subpoena for documents directed to the Administrator of the Environmental Protection Agency ("EPA") related to hazardous waste sites throughout the United States. The letter of the Attorney General is a copy of the same letter directed to the Honorable John D. Dingell, Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce in response to a subpoena that Subcommittee issued to the EPA concerning some of the same documents.

The Attorney General's opinion that EPA need not provide the information required for your Subcommittee inquiry rests on two premises: (1) that the information is beyond the reach of congressional subpoena power because it is "sensitive" material in "law enforcement files" and (2) that a Subcommittee's offer to receive the information in executive session is not a basis for providing it. Neither point is well taken. I have addressed the second premise because it forms a basis of the letter, although it appears more relevant to the issue of confidentiality raised in Chairman Dingell's letter of November 8, 1982 in connection with that subcommittee's subpoena. The Attorney General's discussion of executive session proceedings and the rules governing conduct of such proceedings is nevertheless disturbing because it is based on a complete misunderstanding of the constitutional basis for Congress authority to receive "secret" information.

Regarding the Attorney General's first premise that Congress cannot subpoena material in law enforcement files, the Attorney General's opinion cites no caselaw to support this proposition; indeed, he could not because none exists to support him. Nothing is better established than that Congress investigative power "encompasses inquires concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . [I]t comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).

Of particular importance here is the history of legislative oversight of the Justice Department and its enforcement of the law. Indeed, past congressional investigations have focused on the Department's efforts in particular cases, rather than general or abstract policies.[1] In *McGrain* v. *Daugherty*, 273 U.S. 135 (1926) a Senate committee investigated charges that the Department of Justice had failed to prosecute public corruption, antitrust and other matters.

The Supreme Court expressly recognized congressional authority to examine and inquire into specific enforcement decisions by the Department of Justice whether to prosecute as an incident of the legislative function:

> The subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly *whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings* . . . the subject . . . would be materially aided by the information [sought] . . . the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and . . . the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year. (273 U.S. at 177-78.) (Emphasis added.)

This principle applies with equal, if not greater, force to the Environmental Protection Agency. Congress has every right to see how the laws it passes are being administered and enforced, and whether those charged with responsibility "in respect of the institution and prosecution of proceedings," *id.*, are adequately and properly performing their responsibility.

The Attorney General does not discuss the congressional reach of investigatory power established by *McGrain*, and he does not distinguish it from the situation here. Instead, he argues that special principles, hitherto raised by the Justice Department primarily to defend nondisclosure of *criminal investigations* of the Justice Department itself, should be extended to contexts such as EPA's preparations for civil suits and settlements. Without denigrating the importance of this EPA work, which is, of course, the Subcommittee's reason for its inquiry, those preparations for civil suits or settlements do not raise the concerns involved in release of Justice Department criminal investigation files, such as the danger that

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[1] In fact, some of these investigations have focused on issues such as interference with grand juries and special treatment in cases of White House influence. *See, e.g., Charges of Illegal Practices of the Department of Justice: Hearings Before a Subcommittee of the Committee of the Judiciary of the United States Senate*, 66th Cong., 3d Sess. (1921); *Investigation of Hon. Harry M. Daugherty, formerly Attorney General of the United States, Hearings Before the Select Committee on Investigation of the Attorney General of the United States Senate*, 60th Cong., 1st Sess. vols. 1-3 (1924); *Consent Decree Program of the Department of Justice, Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary*, 85th Cong., 1st & 2d Sess., pts. I and II (1957-58); *Mercury Pollution and Enforcement of the Refuse Act of 1899, Hearings Before a Subcommittee of the Committee on Government Operations of the House of Representatives*, 92nd Cong., 2d Sess., pts. 1-3 (1971-72).

prejudicial pretrial publicity will deny criminal defendants a fair trial or that the safety of FBI informants will be jeopardized. The Attorney General's opinion places its principal reliance on the 1941 opinion of Attorney General Jackson concerning nondisclosure of the FBI's investigative files. Yet the Attorney General cites no precedent for extending the policy regarding FBI criminal investigation files, with their special concerns, throughout the government whenever any matter may relate to civil suits—an enormous extension of secrecy.

Even where the concerns regarding pretrial publicity and due process for defendants have been raised, the courts have not blocked the exercise of the congressional investigative power. For instance, when a witness under indictment in state court on charges relating to the same matters about which the Senate committee sought to interrogate the witness, his challenge to the committee subpoena based on a contention that legislative questioning would aid in the state prosecution resulting in a denial of due process was rejected. *Hutcheson* v. *United States,* 369 U.S. 599 (1962). As the court explained.

> The suggestion made in dissent that the questions which petitioner refused to answer were 'outside the power of a committee to ask' under the Due Process Clause because they touched on matters then pending in judicial proceedings cannot be accepted for several reasons: First, the reasoning underlying this proposition is that these inquiries constituted a legislative encroachment on the judicial function. But such reasoning can hardly be limited to inquiries that may be germane to existing judicial proceedings; it would surely apply as well to inquires calling for answers that might be used to the prejudice of the witness in any future judicial proceeding. If such were the reach of 'due process' it would turn a witness' privilege against self-incrimination into a self-operating restraint on congressional inquiry, and would in effect *pro tanto* obliterate the need for that constitutional protection. (369 U.S. at 613 n. 16.)

Finally, on this point, litigants haver asserted that the conduct of concurrent congressional investigations have prejudiced their right to obtain a fair trial owing to the attendant publicity generally by public congressional hearings. These claims have also been rarely accepted by the courts. We know of only one case reversing a conviction on the basis of prejudicial publicity generated by a congressional investigation, *Delaney* v. *United States,* 199 F. 2d 107 (1st Cir. 1952) (reversal of conviction for failure of trial court to grant continuance until pretrial publicity generated by House committee investigation into subject matter subsided), and even in such rare instances, the holdings run to the *consequences* of concurrent congressional proceedings on the criminal prosecution, not to the *autority* of the Congress to conduct a hearing and summon witnesses. In *United States* v. *Romano,* 583 F.2d 1,4 (1st Cir. 1978), the Senate committee determined not to heed warnings from the Department of Justice that insistence on defendant's testimony would threaten or absolutely bar successful future prosecution, and the conviction was upheld nontheless. *See also Beck* v. *Washington,* 369 U.S. 541,

544 (1962) (upholding conviction of defendant called as a witness before congressional committee five days after indictment).

These cases demonstrate that even in instances where the Congress determines to make public information it has received relative to law enforcement matters, it does not necessarily mean that the concerns raised by the Attorney General are implicated. Even less so, then, unless and until the committee decides in its wisdom to make any portion of the documents public.

Even where FBI intelligence gathering has been at issue, Congress has not foregone its power of inquiry in appropriate circumstances.[2] Yet here, those weightier concerns are not even present. In their absence, the Attorney General would block congressional inquiry on the basis of two much weaker arguments.

First, concern is expressed that congressional inquiry is somehow inconsistent with the absolute prosecutorial discretion vested in the Executive branch, a point not in dispute. The Attorney General has once again confused congressional oversight with interference in prosecutorial decisionmaking. *See,* Letter from William French Smith to President Reagan, Oct. 13, 1981 *reprinted in Congressional Proceedings Against Interior Secretary James G. Watt for Withholding Subpoenaed Documents and For Failure to Answer Questions Relating to Reciprocity Under the Mineral Lands Leasing Act, Report of the Committee on Energy and Commerce,* H.R. Rep. 89d, 97th Cong., 2d Sess. 42, 54 (1982). By reviewing these records, the committee seeks not to influence individual enforcement decisions, but rather to review the integrity and effectiveness of EPA's enforcement program and to evaluate the adequacy of existing law.

Second, concern is expressed that congressional oversight calls for information about which reflects the government's strategy or the methods or weaknesses of its investigations. Yet if this type of conern were recognized as blocking congressional inquiry, it would end a major portion of all such inquiry. Congressional inquiry into foreign affairs and military matter calls for information on strategy and weaknesses in national security matters; congressional inquiry into waste, fraud, and inefficiency, *Watkins* v. *United States, supra,* in domestic operations calls for information on strategy and weaknesses in combating these. Congress does not forego inquiry simply because it may produce information on the government's strategies and weaknesses; the only way to correct either bad law or bad administration is to examine these matters.

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[2] Two recent congressional inquiries have focused on the conduct of investigation by the FBI: the Billy Carter inquiry in 1980 and the various inquiries into ABSCAM in 1982. As more extensive examples, in the mid-1970's House and Senate committees probed allegations concerning domestic intelligence gathering by the FBI and by units of the Justice Department such as the Interdivision Information Unit (IDIU). *See Intelligence Activities and the Rights of Americans, Book II, Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities,* S. Rep. No. 94-755 at 78 (IDIU) and 86 (Cointelpro) (1976); *FBI Oversight, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives,* 94th Cong., 1st & 2d Sess., pts. 1 & 2 (1975–76). These investigating committees and the General Accounting Office examined hundreds of individual cases of domestic intelligence gathering in order to determine the necessity for legislation in the area. The Senate Intelligence Committee declared as its "most important lesson to be derived from our experience," S. Rep. No. 94-755 at IX n. 7, a conclusion characteristic of many of the other investigations of the Justice Department: "effective oversight is impossible without regular access to the underlying working documents. . . . Top level briefings do not adequately describe the realities. For that the documents are a necessary supplement and at times the only source."

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Nor does the fact that these matters may be the subject of civil suit mean that congressional inquiry should be blocked. There is unbroken precedent that Congress may investigate subjects relevant to its legislative function which are concurrently the subject matter of pending suit or likely to come before the courts. No court has ever held, and the Attorney General cites note, that exercise of Congress' investigative power concurrently with the prosecution of cases before the courts interferes in the administration of justice. In fact, the courts have held directly contrary. *See McGrain* v. *Daugherty, supra* at 180; *Sinclair* v. *United States,* 279 U.S. 263, 295 (1929) (authority of Senate "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits").

In any event, claims by litigants that concurrent congressional investigations violate constitutional precepts of fairness of due process, also an apparent concern of the Attorney General, have largely been rejected. *United States* v. *Mitchell,* 397 F. Supp. 166, 179–180 (D.D.C. 1974), *aff'd sub. nom. United States* v. *Haldeman,* 559 F. 2d 31 (D.D.C. 1976), *cert. denied,* 431 U.S. 933 (1977); *United States* v. *Mitchell,* 372 F. Supp. 1239, 1259–60 (S.D.N.Y. 1973).

The Attorney General's second premise is that the Subcommittee's offer to receive information in executive session is not a legal basis for providing that information. The Attorney General argues that "promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files," because the Subcommittee could decide, by formal vote, to use material in public session, and therefore providing the Subcommittee with that material would mean the executive had "lost control" over the material. While the Attorney General quotes previous Department of Justice statements to this effect, he does not cite any judicial or statutory precedent, nor any aspect of the historic role of the receipt of information in executive session, to support his view. Indeed, the Attorney General's opinion professes complete ignorance of judicial opinions regarding the significance in this context of executive session.[3]

However, there is extensive judicial, statutory, and historic precedent for disclosure of the most sensitive material to congressional committees in executive session, notwithstanding the asserted "lost control." The Framers anticipated that Congress would need to receive sensitive information requiring secret treatment, and provided expressly for it in the Journal Clause, Art. I, § 5, Cl. 3, which requires the Senate and House to keep and publish Journals, "except such parts as may in their judgment require secrecy."

Contemporary judicial opinions recognize the significance of that constitutional authority, noting that "Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules." *Goland* v. *Central Intelligence Agency,* 607 F.2d 339, 346 (D.C. Cir. 1978), *cert. denied,* 445 U.S. 927 (1980). The very reason the Fram-

[3] "I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically." Opinion of the Attorney General at 7.

ers conferred this authority on Congress to keep its record secret was so that it could receive sensitive information, such as information about "negotiations about treaties," from the executive.[4] *See generally,* Kaye, *Congressional Papers, Judicial Subpoenas, and The Constitution,* 24 U.C.L.A. L. Rev. 523, 533 (1977) (secrecy clause protects Congress proceedings concerning negotiation of treaties and planning of military operations in wartime).

In light of this, the availability of executive sessions as a means of receiving information without disclosure, and congressional commitments about confidentialilty, have been given strong weight by the courts. Private parties have frequently objected, as the Attorney General has done in this instance, to receipt by congressional committees of information from law enforcement agencies; their objections relied on the ground urged by the Attorney General, that a committee might subsequently use executive session material in public. The courts have uniformly given this objection short shrift, holding that disclosure to congressional committees is not tantamount to public disclosure. *Exxon Corp.* v. *FTC,* 589 F.2d 582, 589 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 943 (1979). The courts "presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *FTC* v. *Owens-Corning Fiberglass Corp.,* 626 F.2d 966, 970 (D.C. Cir. 1980).

Similarly, a leading Supreme Court case notes the importance of executive session as a basis for receiving testimony when there is parallel litigation. In *Hutchenson* v. *United States, supra,* the Court ruled that Congress could obtain testimony even from a defendant facing a pending state criminal case. As Justice Brennan noted in his seminal concurring opinion, "Surely it cannot be said that a fair criminal trial and a full power of [congressional] inquiry are interests that defy accommodation. . . . [by means such as] postponement of inquiry until after an immediately pending trial, *or the taking of testimony in executive session*—or that the State grant a continuance in the trial" 369 U.S. at 624–25.

Three examples directly contradict the Attorney General's view that the availabililty of executive session is not a basis for providing sensitive information. First, both the House and Senate receive extensive secret intelligence material through their intelligence committees, precisely because both the House and Senate have rules that such material shall be kept secret by the committees. *See* H.R. Rule 48(7), Rules of the House of Representatives § 944, H.R. Doc. No 398, 96th Cong., 2d Sess. 659, 665, (1981); Senate Resolution 400, 94th Cong., 2d Sess., § 8 (1976). Second, authorized House and Senate committees receive confidential tax information,

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[4] *See* R. Berger, *Executive Privilege: A Constitutional Myth* 204–05 (1975). A clear early example of the link between the Executive providing material, and Congress receiving it in executive session, occurred in 1800. The Senate, in response to a request from President Adams that his instructions to envoys negotiating with the French be treated in strictest confidence, adopted a resolution—which, with limited changes, is currently Senate Rule XXXIX—specifically requiring that treaties and confidential communications be kept secret until the Senate by resolution remove that injunction of secrecy. *See Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcom. to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Comm on the Judiciary,* 96th Cong., 2d Sess. 1690 (1980) (Congressional Research Service memorandum describing history of executive session treatment of material).

precisely because they receive it in executive session. *See* 26 U.S.C. § 6103(f)(3), § 6103(f)(4)(B).

Third, the Justice Department itself has disclosed confidential information to House and Senate committees, such as wiretap information from a pension fraud and bribery investigation, based on the receipt of such information in executive session and commitments concerning nondisclosure. A defendant challenged this arrangement in court as insufficiently protecting him against public release of this information, but the court upheld the arrangement as sufficiently protective and the objection was overruled. *United States* v. *Allen M. Dorfman, et al.,* No. 81 CR 269 (bench opinion, July 1, 1981), *reprinted in Court Proceedings and Actions of Vital Interest to the Congress No. 14: Current to Sept. 1, 1981,* at 407–411 (House Judiciary Committee Print 1982).

In sum, the spectre raised by the Attorney General that Congress compromises the prosecution of cases by concurrently investigating the subject matter, even in advance of any decision to make public the information it obtains, is unfounded. It is also inconsistent with the prior position of the Department of Justice. For example, in 1979, the representatives of the Department testified in connection with an investigation into fraudulent oil pricing and Congress requested access to open civil litigation files in a specific case. The Department stated it has "[n]o objection, except that we would ask that because of the pending litigation that they not be made public at this juncture, *unless the committee has some compelling need.*" *White Collar Crime in the Oil Industry; Joint Hearings Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce and the Subcomm. on Crime of the House Comm. on Judiciary,* 96th Cong., 1st Sess. 157 (1979) (testimony of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice) (emphasis added).

Thus, there is ample precedent for congressional inquiries into the conduct by the Executive of investigations and litigation. There is ample precedent for receipt in executive session as a basis for providing sensitive material. There is no reason for extending the secrecy principles hitherto reserved for FBI criminal investigative files to the entire government.

APPENDIX N

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., December 9, 1982.

Hon. ELLIOTT H. LEVITAS,
Chairman, Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for meeting with Assistant Attorney General, Office of Legal Counsel, Theodore B. Olson, Associate Administrator for Legal and Enforcement Counsel and General Counsel of the Environmental Protection Agency, Robert M. Perry, and me yesterday afternoon regarding the apparent impasse which presently exists between your Subcommittee and the Administration regarding your Subcommittee's subpoena for copies of documents generated by the Environmental Protection Agency ("EPA"). Your Subcommittee is interested in receiving copies or examining all documents generated by the EPA in its enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The outstanding subpoena (the validity of which has not been conceded) seeks production of a large quantity of such documents and your Subcommittee has taken the position that none of them may be withheld from it. Your Subcommittee has voted to find the Administrator of the EPA in contempt of Congress for not producing some of the subpoenaed documents notwithstanding that she is acting in compliance with an instruction from the President and the advice of the Attorney General.

As you know, the President and the Attorney General have expressed the concern that a narrow range of documents contained in sensitive open law enforcement investigative files, the disclosure of which (at least while a case is pending or in the development stage) might adversely affect a pending or potential enforcement action or the rights of individuals, should not be released by the Executive Branch because doing so would be inconsistent with the President's constitutional obligation to take care that the laws be faithfully executed. These documents are few in number (undoubtedly less than 1 percent of the enforcement files) and relate primarily to tactics and strategy in the development of a particular case against particular potential defendants (lists of prospective witnesses, legal discussions and the like). At the same time, the Administration does not and will not contest the right of your Subcommittee to the factual and technical information about which you and members of your Subcommittee (particularly Congressman Roe) expressed such concern at the hearing on December 2, 1982 as well as information regarding enforcement efforts, enforcement policy, and enforce-

ment directions and results to date. Your Subcommittee, however, has determined that this is not sufficient and you continue to assert the right to inspect every document in EPA's enforcement files.

In the spirit of attempting to reach a compromise solution to this impasse, and with full reservation of the Subcommittee's rights and the rights of the Legislative Branch as a whole, yesterday you proposed an accommodation which would include the following solution:

1. Staff of your Subcommittee would be permitted to have access to all EPA documents relative to the 160 hazardous waste sites in issue.

2. Subcommittee staff would have the unrestricted right to examine the EPA documents and determine what documents it wished to have copied and produced for further staff work or made available to the Subcommittee.

3. EPA and/or Justice Department enforcement officials would then examine the documents which the Subcommittee staff designated for copying and designate those documents which were considered by the Executive Branch to be sufficiently sensitive to an open enforcement proceeding (including the case development phase) that dissemination beyond the Executive Branch would adversely affect the ability of the Executive Branch to enforce the law. Copies of those documents would be made and transferred to EPA headquarters in Washington but would not be provided to the Subcommittee. Copies of all the other documents designated by the Subcommittee staff would be furnished to the Subcommittee.

4. Members of the Subcommittee and staff members* would be permitted to examine the particularly sensitive documents at EPA headquarters in Washington under Executive Session Rules so that the documents would not be physically turned over to the Subcommittee and would not therefore have to be made available to every member of the House of Representatives pursuant to the Rules of the House of Representatives.

5. If the Subcommittee thereafter determined that it needed to have copies of any of the particularly sensitive documents, it would then have the right to pursue efforts to obtain copies of those documents through the mechanism of a subpoena.

6. Members of the Subcommittee and the staff would treat the information contained in the enforcement sensitive documents as confidential but, as you noted in response to a question, the Subcommittee would not waive its right to utilize the information in any way which it found to be proper and appropriate.

I believe I have correctly summarized your proposal but, since I was not taking notes, I may have overlooked some aspect of it. If so, please correct me as promptly as possible because we wish to make sure that we respond to your proposal and not to something which we have misunderstood to be your proposal.

The principal problem which we have with the foregoing proposal is that it contemplates that the President will lose control over

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*You may have suggested that access at this point would be limited to the Chairman and the Ranking Minority Member and selected staff members. Our recollection on this point is not clear and we would welcome a clarification if we have misunderstood your position.

the contents of materials which those who assist him in enforcing the law have determined to be in a narrow category of documents the release of which would adversely affect the Executive Branch's ability to enforce the law. Accordingly, we are not in a position to accept your proposal. We believe, however, that a somewhat modified version of it would be acceptable to the President and should fully address your concerns. It may not eliminate every area of dispute, but it would narrow the focus of the dispute so substantially that any remaining areas of disagreement could, if absolutely necessary, be resolved in an appropriate fashion by the judiciary.

We observe in passing that one of our problems with your proposal is that we feel that it would be extraordinarily difficult to withhold access to a particular document to any committee or subcommittee of Congress if we made such access available to one Subcommittee and its staff or to some members of Congress. It is not for the Executive to distinguish between the rights of particular members or particular committees. Second, as noted above, the proposal contemplates that the Executive would part with control over the information in the sensitive enforcement documents. Members of the Subcommittee staff would, at the outset, have unfettered access to sensitive enforcement files. It is a logical and legal consequence of the President's responsibility faithfully to execute the law that material should not be released from his control if he determines that release of that material would impair enforcement efforts.

Your proposal contains an ingredient for postponing the dispute with respect to certain documents, i.e., those which the Subommittee, after undertaking the process described above, decides that it must nonetheless have in its possession. Our counter-proposal similarly reserves the rights of the two branches to resolve at a subsequent time any remaining disputes as to any particular documents. Our proposal (which is, of course, predicated on the concept that it would resolve the pending dispute over all presently outstanding subpoenas) is as follows:

1. The Subcommittee staff would be given access to all EPA enforcement files relative to the 160 hazardous waste sites in which you have an interest. Those files would remain where they are now, either at EPA headquarters or at the regional offices, respectively. Your staff members would provide notice, in advance, of which files were going to be examined so that EPA officials could initially examine the files to isolate those documents which were particularly sensitive from an enforcement standpoint. Those documents would be removed from the files and the remaining balance of the EPA enforcement files would be made available to your Subcommittee staff and ultimately to the Subcommittee, subject to some appropriate understanding regarding confidential treatment with respect to certain materials in those files. We expect the vast majority, probably in excess of 99% of the enforcement files, would be made available to the Subcommittee and the staff in this fashion. After examining the remaining files and after having been advised what documents had been set aside from the files, and after a briefing on the general nature of the contents of such withheld materials, your staff could determine whether it was, in fact, necessary, in their judgment, to examine those files.

2. Those withheld documents considered sensitive would then be analyzed by at least four persons, two in EPA and two in the Land and Natrual Resources Division of the Department of Justice. One person in EPA and ond of the Justice Department individuals involved in this process would be professional, career attorneys engaged in the EPA enforcement process and, at Justice, in that section of the Department responsible for enforcement of CERCLA. In addition, one EPA official and one Justice Department official responsible for examining the withheld documents would be persons holding policy level positions. The Justice Department official would be a Deputy Assistant Attorney General. If those four individuals concurred that a particular document was sufficiently sensitive that its release would adversely affect the ability of the Executive to enforce the law, that document would be considered for withholding by the Executive Branch. Thereafter, those documents would actually be withheld only if the conclusions regarding their sensitivity were concurred in by an additional member of the Department of Justice in the Office of Legal Counsel and by an attorney in the Office of Counsel to the President. In short, the document would be withheld only of the collective judgment of the foregoing individuals was that the document needed to be withheld under the foregoing standards. If so, that document would be described to you in detail and the Executive Branch would set forth its reasons why it believed that the document should not be disclosed.

3. If the Subcommittee and its staff disagreed with the Executive Branch's position concerning the need for confidential treatment of the document in question or if it had additional reasons for why the document should be produced, those conclusions and those reasons would be articulated to the Executive Branch and the document in question would be reviewed again with those additional considerations in mind.

4. Only if the foregoing process did not lead to a resolution of the dispute with respect to the document in question would it be necessary to proceed further. At that point if the Subcommittee was not satisfied with the good faith and the legitimacy of the position of the Executive Branch, the Subcommittee would retain all rights that it presently has to pursue all lawful efforts to obtain the document in question.

We believe that this process is reasonable. It insures that no document will be withheld unless career enforcement lawyers and policy officials at two separate agencies and an attorney in the Office of Counsel to the President believe that the document should be withheld. Documents will not be withheld in order to shield illegal conduct by Executive Branch persons. Furthermore, even after the process described above, EPA and the Department of Justice would remain willing to discuss factual information contained in any withheld documents and would be willing to discuss particular needs that the Subcommittee may still have. Finally, the Subcommittee, under this process, will still have all rights which it presently has to seek the mandatory production of the document through legal processes.

We understand that you do not agree that the Executive Branch has the right to withhold any documents from the Legislative

Branch and that you feel that it is not appropriate for the Executive Branch to make any "unilateral" determination relative to the withholding of any document. We respectfully disagree with your position that no documents may be withheld by the Executive Branch and the position which follows from it, that the documents must be given to the Legislative Branch so that the Legislative Branch might unilaterally determine how the documents will be handled. We believe that the position we have taken is the only one which is consistent with the Constitution. We submit that our position does not involve a final determination by the Executive Branch from which the Legislative Branch has no legal recourse, but it similarly does not allow for a final unreviewable determination by the Legislative Branch. In fact, our position is the only approach which allows for each Branch to maintain a legitimate difference of opinion regarding the release of any particular document and, if necessary, enables the Judicial Branch ultimately to resolve the issue without an irreparable waiver of the rights of either the Legislative Branch or the Executive Branch.

We thank you for your courtesy, and we hope that the foregoing will allow us to resolve what we regard to be an unnecessary dispute between co-equal branches of the government of the United States.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General
Office of Legislative Affairs.

APPENDIX O

CONTEMPT RESOLUTION REPORTED BY COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

Resolved, That the Committee on Public Works and Transportation report and refer refusal of Anne M. Gorsuch, Administrator, Environmental Protection Agency, to comply with the subpoena dated November 16, 1982, issued by the Subcommittee on Investigations and Oversight, together with all facts in connection therewith, to the House of Representatives with the recommendation that Administrator Gorsuch be cited for contempt of the House of Representatives to the end that she may be proceeded against in a manner and form provided by law.

ADDITIONAL VIEWS OF JACK FIELDS

During consideration of the contempt citation served on Anne M. Gorsuch, Administrator of the Environmental Protection Agency by the House Committee on Public Works and Transportation, I felt compelled to vote "present" for a number of reasons. First and foremost among these reasons was the haste with which our Committee acted. In moving with such dispatch our Committee failed to either; fully analyze and review the most recent compromise arrangement put forth by the Justice Department to make these documents available to the Committee (dated December 9, 1982) or, more significantly, provide adequate time for members of the full Committee to familiarize themselves with the history and details of this very serious situation. Serving a congressional contempt citation on a member of the Executive Branch is an issue of the gravest constitutional nature and should not be exercised in a manner which could be construed as frivolous or partisan. Each and every member of this Committee should, I believe, be provided a sufficient amount of time to become fully briefed on this matter so that should a contempt vote be taken it would be done so with every possible question answered and every potential option pursued.

From my own cursory inspection of this matter and the circumstances leading up to the contempt citation, the only known fact is that the Administration and the Oversight and Investigations Subcommittee ardently and diversely disagree on the proper oversight authority of Congress in administering the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and specifically with regard to the disclosure of some very sensitive documents pertaining to Superfund.

Sadly for the thousands of individuals who live near or work near these hazardous waste disposal sites, this current controversy only further exacerbates the long-awaited clean-up process of these environmental hazards. My own district is home to the three of the sites listed by EPA as priority projects of Superfund clean-up and, I do not feel this contempt citation will bring my constituents any closer to a safe, clean environment.

I continue to believe it is most unfortunate that the proper administration of one of our nation's most environmentally critical laws is being impeded by a partisan discourse between Congress and the Executive Branch. Finally, this member believes that the entire Public Works and Transportation Committee should have the time to study all the facts leading to this very serious contempt citation so that we can act with dispatch to assure a safe environment for our nation's citizens.

JACK FIELDS,
Member of Congress.

MINORITY VIEWS OF REPRESENTATIVES CLAUSEN, SNYDER, HAMMERSCHMIDT, GOLDWATER, HAGEDORN, STANGELAND, GINGRICH, CLINGER, SOLOMON, HOLLENBECK, DECKARD, GRISHAM, JEFFRIES, FIELDS, SHAW, McEWEN, WOLF, AND ATKINSON

The undersigned Members of the Committee on Public Works and Transportation are unable to support the recommendation contained in the foregoing Report that the Administrator of the Environmental Protection Agency, Anne M. Gorsuch, be cited for contempt of Congress for failure to produce documents subpoenaed on November 22, 1982, by the Committee's Subcommittee on Investigations and Oversight in connection with its investigation into the contamination of the Nation's water resources by hazardous chemical wastes.

At the outset, we want to emphasize our strong support for the Subcommittee's efforts to review and study the effectiveness of the Superfund law and the manner in which it is being implemented by the Environmental Protection Agency. The Subcommittee's inquiry, in our view, is extremely important and most appropriate to assure that the Superfund law is working and being administered to the fullest intent of the Congress.

We also support, as a general matter, the efforts of the Subcommittee to gain access to EPA's enforcement related files. Congress cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. For this reason, Congress has the power to compel the production of information needed for the efficient exercise of the legislative function.

While we support the concept of requiring EPA to produce documents necessary for the Subcommittee's investigation, we cannot support the Committee's hasty and ill-conceived action in recommending that Administrator Gorsuch be found in contempt of Congress for failing to produce all of the documents subpoenaed by the Subcommittee on November 22, 1982.

Our principal reason for not supporting the Committee's recommendation is that it is not the product of careful, independent Congressional deliberation. Instead, the resolution was called up with only two days notice to the Full Committee. This procedure did not give Members a chance to adequately study the issues or to fully explore options for resolving the dispute.

We believe that this unfortunate confrontation was unnecessary and could have been avoided. We had presumed all along that the Committee was interested in obtaining the documents in question, rather than to find Administrator Gorsuch in contempt of Congress.

In determining the wisdom and propriety of citing the EPA Administrator for contempt, we believe that a number of factors should be considered.

1. The power of Congress to find someone in contempt is an extraordinary power, and should not be used without clear reason to do so.

It is important to understand the full effect of citing the EPA Administrator for contempt. If the House cites Ms. Gorsuch for contempt, the appropriate U.S. attorney is required by statute (2 U.S.C. 194) to bring the matter before the grand jury for its action. Ultimately, Ms. Gorsuch could be subject to a criminal fine of not less than $100 nor more than $1000 and imprisonment for not less than one month nor more than 12 months.

This is an extremely serious matter, and one which should have received careful consideration. Yet the Full Committee was given only two days notice of the meeting. This simply was not sufficient time for the Members of the Full Committee who are not on the Investigations and Oversight Subcommittee to review the facts of this case, or to research the extremely complex issues and precedents involved.

Furthermore, the Full Committee meeting itself was brief, and efforts to offer alternatives or to discuss the implications of the proposed actions were given short shrift. In fact, the Ranking Minority Member of the Committee was not even allowed to finish his opening statement. In addition, a motion to postpone the final vote until Wednesday, December 15th, so that members could have time to study the issues, was rejected solely along party lines.

2. The Committee's action fails to recognize that EPA has agreed to turn over to the Subcommittee a substantial amount of information. Administrator Gorsuch agreed to provide approximately three-quarters of a million pages of enforcement file documents for the Investigations and Oversight Subcommittee, relative to 160 hazardous waste sites, including all technical and factual data and much confidential material. Neither she nor any other official of the Administration has contested the Subcommittee's authority to request and receive information relative to its oversight and investigatory tasks.

3. The Committee's action fails to recognize that the President directed Ms. Gorsuch to withhold the documents. With respect to the documents at issue, the Administrator has been specifically directed, by order of the President of the United States, dated November 30, 1982, that "sensitive documents found in open law enforcement files should not be made available to Congress" on the grounds that "dissemination of such documents outside the Executive Branch would impair . . . [the President's] solemn responsibility to enforce the law."

The President's decision and order to the Administator of the Environmental Protection Agency was based upon the legal opinion of the highest ranking legal officer of the United States Government, an opinion and order which the Administrator has no standing to reject.

4. The Committee did not exhaust all means of resolving the dispute before resorting to the contempt citation. We are convinced that this dispute could have been avoided if the Committee had not

rushed into the contempt proceeding but instead had taken the time to consider all alternative ways to resolve the problem. This can be best illustrated by a few examples.

First, prior to the Full Committee meeting, White House officials asked to meet with the Full Committee Chairman and Ranking Minority Member. The meeting was not held.

Second, White House officials offered to show the Chairman and Ranking Minority Member a sampling of the withheld documents so that they could better understand the Administration's position on this matter. This overture was rejected.

Third, a compromise proposal was offered which would have given the U.S. District court in the District of Columbia the jurisdiction to determine the validity of the Subcommittee's subpoena. White House officials indicated that the Administration would not only support this legislation but would work in the House and Senate to enact it during the lameduck session. This proposal was rejected.

And fourth, the Administration, in responding to a compromise proposal made by the Subcommittee Chairman, offered a counter proposal in a letter dated December 9, 1982. No formal response was made to the Administration's proposal prior to the Full Committee meeting to cite Ms. Gorsuch for contempt.

5. The legal issues involved in this matter are extremely complex and should have been analyzed more carefully. Members of the Committee did not have sufficient time in our view, to review the competing arguments and to form an independent judgement on the merits of the issue.

Stated simply, the Subcommittee Chairman seems to be of the view that the Subcommittee has a right to all of EPA's records and that staff should be given complete access to EPA's files, including the right to copy any documents it wants. It is alleged that the Legal Memorandum dated December 8, 1982 from the General Counsel to the Clerk supports this position. A copy of this memorandum is included in the Majority Report.

The Administration, on the other hand, disputes that Congress has an automatic right to each and every document in EPA's files. The Attorney General of the United States has taken the position that it is not in the public interest for sensitive documents found in open law enforcement files to be given to Congress or its committees except in extraordinary circumstances.

(A copy of the Attorney General's opinion is attached (Attachment A). Also attached is a copy of a DOJ legal memorandum responding to the Legal Memorandum of the General Counsel to the Clerk of the House (Attachment B) and a DOJ memorandum outlining the history of Presidential invocations of executive privilege vis-a-vis Congress (Attachment C)).

The cases construing executive privilege are very limited and no controlling judicial precedent exists governing attempts by a committee of Congress to obtain materials from the Executive Branch. That is, the Supreme Court has yet to be called upon to resolve the question of the respective rights of the Executive and Legislative Branches in regard to a claim of privilege as a defense to compulsory legislative process for documents residing within the Executive Branch.

In our view, these conflicting legal opinions should have more carefully analyzed before the Committee proceeded to cite an Executive Branch official for contempt.

6. The Committee's action fails to adequately consider EPA's contention that on-going enforcement cases might be jeopardized. While we are in agreement that the Congress has a legitimate right to information which it needs to carry out its oversight and investigative responsibilities, we are concerned over EPA's allegation that disclosure of certain files might jeopardize on-going enforcement actions. The issue is certain documents in open law enforcement files. They are at the stage where EPA and/or the Justice Department are developing cases for prosecution, or are actually in the enforcement process by U.S. attorneys. What the Committee is saying—by going forward with the contempt resolution—is that these documents, despite their sensitive nature and despite the fact that criminal prosecutions could be jeopardized, must be made available to the staff of this Committee, the Members of this Committee and—by the Rules of the House—to all House Members. We are not sure that we are prepared to go this far at this time. The issue is far more complex than it seems on the surface, and we have not had sufficient time nor information to form a judgment. We do believe that the Committee should have availed itself of the Administration's offer to look at some of the documents so that we could better evaluate EPA's claim with respect to these documents.

7. The Committee's action fails to recognize certain potential problems with respect to enforcement of the subpoena issued on November 22, 1982. If the House cites Ms. Gorsuch for contempt, the matter will be turned over to the U.S. attorney for criminal prosecution. It is, therefore, relevant to consider potential problems that might come up with respect to the subpoena.

First, the subpoena is extremely broad, and this could become an important factor in a criminal prosecution for failure to comply. The subpoena requests that virtually all documents created since December 11, 1980, pertaining to 160 hazardous waste sites be turned over to the Subcommittee. EPA has estimated that this would require the location, segregation, duplication and shipping of more than 787,000 pages of documents.

Second, EPA has stated that the subpoena is technically defective. Since the Agency has so far only issued an interim priority list, not under Section 105(8)(B), the subpoena does not apply to any documents in the possession or custody of EPA. No sites have been listed under section 105(8)(B).

Third, we are concerned the Committee has not yet reviewed the material which Ms. Gorsuch was prepared to turn over to the Subcommittee. According to EPA, she withheld only a small fraction of the total documents demanded by the Subcommittee; moreover, no factual or technical materials are being withheld from Congress—only enforcement strategy such as analyses of strengths and weaknesses of the Government's case. It seems to us that the Committee's case would be much stronger if we reviewed the materials which EPA did provide us before we conclude that there is a compelling need for us to have access to the remaining documents.

In conclusion, we have serious reservations about the wisdom and propriety of the Committee's recommendation to cite the Administrator of the Environmental Protection Agency, Anne M. Gorsuch, for contempt of Congress. We are, therefore, unable to support the Committee's recommendation at this time.

Our principal reason for not supporting the contempt citation is that we feel that this matter was rushed through the Committee without adequate time to study the complex legal and factual issues involved. Stated simply, a number of us feel that we do not have sufficient information to make a reasoned decision.

We also believe that this confrontation was unnecessary and could have been avoided had more time been taken at the Full Committee to evaluate various alternatives and options.

And finally, we note that this approach, that is, bringing criminal charges against Ms. Gorsuch, will not necessarily result in the documents being made available to the Committee. We believe that the Committee's focus should have been to obtain the documents in question, rather than concentrating on citing Administrator Gorsuch in contempt of Congress.

DON H. CLAUSEN.
GENE SNYDER.
JOHN PAUL HAMMERSCHMIDT.
BARRY GOLDWATER, Jr.
TOM HAGEDORN.
ARLAN STANGELAND.
NEWT GINGRICH.
WILLIAM CLINGER.
GERALD SOLOMON.
HAROLD HOLLENBECK.
JOEL DECKARD,
WAYNE GRISHAM.
JIM JEFFRIES.
JACK FIELDS.
E. CLAY SHAW, Jr.
BOB MCEWEN.
FRANK R. WOLF.
EUGENE ATKINSON.

Attachment A

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 30, 1982.

Hon. ELLIOTT H. LEVITAS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Public Works and Transportation, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have had occasion to reiterate, in the attached letter to Chairman Dingell of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, the historic position of the Executive Branch that it is not in the public interest for sensitive documents found in open law enforcement files to be given to Congress or its committees except in extraordinary circumstances. I am aware that your Subcommittee has issued to Administrator Gorsuch of the Environ-

mental Protection Agency ("EPA") a subpoena apparently seeking copies of some 787,000 documents in open law enforcement files related to approximately 160 hazardous waste sites located throughout the United States. At least 23 and probably more documents covered in your Subcommittee's subpoena are of that class covered by my letter to Chairman Dingell, since they reflect prosecutorial strategy and other internal deliberations regarding prosecution of the particular cases involved.

Because the principles articulated in the attached letter to Chairman Dingell are fully applicable to some of the documents arguably within the scope of your Subcommittee's subpoena, I believe it appropriate to provide you with a copy of that letter at this time. Because neither I nor my staff have previously communicated directly with you on this particular matter, I would also like to express my hope that, after you have had the benefit of my views on this issue, set in their historical perspective, you will no longer seek to compel production of this class of documents from the Adminstrator. Should you wish to discuss this matter further prior to the Subcommittee's scheduled December 2 hearing, I would ask that you contact Assistant Attorney General McConnell of my Office of Legislative Affairs at your convenience.

I would also add that I am confident that the legislative needs of your Subcommittee can be met without the production by the Administrator of sensitive documents in open law enforcement files. That is certainly the lesson that history teaches, and I believe you will agree that it is incumbent on both of our Branches to avoid constitutional confrontations so long as the needs and prerogatives of each Branch can be harmonized.

Sincerely,

WILLIAM FRENCH SMITH,
Attorney General.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 30, 1982.

Hon. JOHN D. DINGELL,
Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Oversight and Investigations of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this

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letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless, it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

"It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.

"Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago: "the Executive

cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

Other objections to the disclosure of law enforcement files included the potential damage to proper law enforcement which would be cause by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . . *"United States* v. *Nixon,* 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

"I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

"[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations

in progress, dissemination to the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents."

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and *all Members of the House shall have access thereto. . . .*" In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interst for such documents to be made public.[1] To the extent that a congressional committee be-

[1] Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in *United States* v. *Nixon*, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion

Continued

lieves that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review *(See Senate Select Committee* v. *Nixon,* 498 F. 2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately " 'to say what the law is' with respect to the claim of privilege presented in [any particular] case." *United States* v. *Nixon,* 418 U.S. at 705, *quoting Marbury* v. *Madison,* 1 Cranch 137, 177 (1803).

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination.[2]

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

In closing, I emphasize that we have carefully reexamined the consistent position of the Executive Branch on this subject and we

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in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under *United States* v. *Nixon* would be identical even if the Court had itself not used the word "public" in the relevant passage.

[2] It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongiong and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

WILLIAM FRENCH SMITH,
Attorney General.

Attachment B

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGAL COUNSEL,
Washington, D.C., December 14, 1982.

MEMORANDUM FOR THE ATTORNEY GENERAL

Re Response to Legal Memorandum of the General Counsel to the Clerk of the House of Representatives Regarding Executive Privilege.

On December 8, 1982, the General Counsel to the Clerk of the House of Representatives transmitted to Chairman Levitas of the Subcommittee on Investigation and Oversight of the House Committee on Public Works and Transportation a memorandum (attached) (hereafter "General Counsel Memorandum") responding to your November 30, 1982 letter to Chairman Dingell of the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce dealing with the assertion of Executive Privilege over documents found in open law enforcement files. This memorandum will discuss the more substantial inaccuracies and mischaracterizations on the General Counsel Memorandum. We will not in this memorandum attempt to restate or reconsider the analysis in your November 30 letter to Chairman Dingell, because the General Counsel Memorandum does not suggest the need to do so.

Before responding to the specific points raised by the General Counsel Memorandum, certain general observations are in order. First, although the General Counsel Memorandum relies on or cites to 13 separate court decisions in support of the various propositions asserted, not a single one of those authorities deals with an assertion of Executive Privilege by the President in response to a subpoena issued by a congressional committee or even a claim of Executive Privilege against a Judicial Branch subpoena. For some reason not disclosed in the General Counsel Memorandum, it does not even mention the major judicial authorities which do treat the subject of Executive Privilege. Thus, as is often our experience in these situations, the legal argument put forward by a congressional entity to counter the Executive's legal position on this issue fails to grapple with the extant judicial authority that is either directly in

point, *e.g., Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F. 2d 725 (1974), or is highly relevant to the issues at hand, *e.g., United States* v. *Nixon*, 418 U.S. 683 (1974). Although such cases are relatively few in our jurisprudence, any responsible attempt to address the profoundly important issues presented by a confrontation such as the present one between the two coequal Branches must confront and attempt to apply available precedent.

Second, the main thrust of the General Counsel Memorandum consists of a explanation and defense of the constitutional basis for Congress power to investigate generally and to investigate the Executive Branch specifically. Neither your letter of November 30, 1982 to Chairman Dingell, your opinion to the President of October 13, 1981 on the subject of Executive Privilege, nor any of the authorities authored in the Executive Branch upon which those documents rely have questioned in any way that Congress may appropriately empower its committees to investigate the Executive Branch's conduct of its duties and responsibilities. The challenge and responsibility in situations involving competing interests and obligations of the two coequal Branches is to attempt, to the extent possible, to balance the competing interests of the two Branches. The General Counsel Memorandum neither recognizes the Executive's constitutional prerogative nor attempts to balance the competing interests. Hence, because the General Counsel Memorandum essentially assets the existence of general congressional powers which the Executive has not disputed, ignores the relevant legal authorities in favor of decisions largely irrelevant to the present dispute, and does not seriously address the need of the two Branches to accommodate the interests of the other, there is very little in the General Counsel Memorandum to which a response can be made.

Third, the General Counsel Memorandum contains no discussions of, and reflects no appreciation for, the principle of separation of powers which is fundamental to our Constitution and, of course, to the most basic understanding of the concept of Executive Privilege.[1] The General Counsel Memorandum proceeds from the unstated premise that congressional power to investigate and to demand and receive documents in the possession of the Executive Branch is unlimited,[2] irrespective of claims by the Executive that release of certain information by the Executive Branch to the Legislative Branch would impair the President's constitutional obligation to "take care that the Laws be faithfully executed." Art. II. Section 3. The Framers of our Constitution regarded the combination of the powers of government as "the very definition of tyranny." The Federalist, No. 47 (Madison). They were particularly concerned about the threat of combining the power to legislate and the power to execute the law. They agreed with Montesque that "there can be no liberty" "when the legislative and executive powers are

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[1] "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, *supra*, 418 U.S. at 708.

[2] On December 3, 1982 the Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce stated that Members of Congress "have the power under the law to receive each and every item of information in the hands of the government . . . ." Remarks by Chairman Dingell, Transcript, p. 162.

united in the same person or body." *Id.* Furthermore, because the legislative power was so great,

> where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reasons prescribe; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions. (The Federalist, No. 48 (Madison))

Without some recognition of these principles, including the concept that there are limits on the power of the Legislative Branch and that there are functions which were deliberately vested in the Executive Branch and placed beyond the reach of the Legislative Branch, it is not possible to present an objective analysis of Executive Privilege or its application to particular circumstances.[3]

These deficiencies in the General Counsel Memorandum can, we believe, be easily traced to the historical attitude of congressional counsel in these clashes between the two political Branches over access to documents. For example, counsel for the Senate Select Committee on Presidential Campaign Activities (the "Watergate" Committee) argued to the Court of Appeals in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra,* that the district court below had no authority to balance the competing interests of the Executive and Congress once that court had rejected the Executive's claim of an absolute privilege. But, as the Court of Appeals pointed out in its opinion, a prior decision of that same court, *Nixon* v. *Sirica,* 487 F.2d 700 (D.C. Cir. 1973), had already squarely rejected the proposition that either the Executive or Legislative Branches has any absolute rights in this area or that either could sit in final judgment of the rights implicated in any particular disputes. 498 F.2d at 729. Our point here is simple but important: because the General Counsel Memorandum makes no serious attempt to weigh the competing interests of the two Branches in the context of the present facts and circumstances, it is largely beside the point. What follows are specific rejoinders to points made in the General Counsel Memorandum which we believe to warrant comment.

1. Characterization of the Executive's Position

The General Counsel Memorandum mischaracterizes your position on two important points and proceeds, using the rhetorical "straw man" device, to refute positions which you have not asserted.

The General Counsel Memorandum states that your position is "that the information is beyond the reach of congressional subpeona power because it is 'sensitive' material in 'law enforcement

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[3] The General Counsel Memorandum discusses the enumerated power of the Legislative Branch under the Constitution to maintain necessary secrecy. The Memorandum simply ignores that "the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *United States* v. *Nixon, supra,* 418 U.S. at 705–06.

files . . . ,' " (p. 1) and that your premise is that "Congress cannot subpoena material in law enforcement files." (p. 2) However, your position is much more limited—that the information at issue here is of a peculiar and special nature such that its disclosure would impair the President's ability to enforce the law and that such information need not be disclosed by the Executive absent extraordinary circumstances.

The only interest which has been asserted by the Legislature in seeing the material in such sensitive *segments* of files is identified in the General Counsel Memorandum as a "right to see how the laws it passes are being administered and enforced, and whether those charged with responsibility [for enforcement] are adequately and properly performing their responsibility." (p. 3) The authority relied upon by the General Counsel Memorandum on this point, *McGrain* v. *Daugherty,* 273 U.S. 135 (1926), involved a subpoena issued to the brother of a former Attorney General. Nowhere in that case did the Supreme Court suggest that the subpoena power exercised in that case by a congressional committee could have been used to obtain production of documents in open law enforcement files. Furthermore, the Court was careful to point out that the congressional investigation then underway for which the subpoena had been issued was based highly specific alleged acts of criminal misconduct and malfeasance in office by that former Attorney General. *Id.* at 150–52. Thus, not only did *McGrain* not involve a subpoena directed to the Executive, a characteristic, as noted above, common to all the judicial authority relied upon by the General Counsel Memorandum, but it involved a factual situation which arguably could constitute the kind of extraordinary circumstance contemplated by your opinion to the President of October 13, 1981 and your letter to Chairman Dingell of November 30, 1982.[4]

Next, the General Counsel Memorandum mischaracterizes and then rejects your position that the Committee's offer to receive the information in "executive session" does not eliminate the Executive Branch's constitutional concerns and that release under such circumstances effectively destroys the President's privilege. The General Counsel Memorandum states that your view of "executive session proceedings . . . is nevertheless disturbing because it is based on a complete misunderstanding of the constitutional basis for Congress' authority to receive 'secret' information." (p. 1).

Three responses to this segment of the General Counsel Memorandum come to mind. First, nowhere does the Memorandum challenge your position that once the documents are provided to a Committee, the President in fact and in law loses control to the extent that the Committee has, from that time forward, the unilateral

[4] The General Counsel Memorandum at 3 observes that your letter to Chairman Dingell of November 30, 1982 "does not discuss the congressional reach of investigatory power established by *McGrain,* and he does not distinguish it from the situation here." As indicated above, the legal point decided by *McGrain*—the enforceability of a congressional subpoena against a private person in the context of an investigation of alleged corruption in the Department of Justice—does not address the additional issues presented by a congressional subpoena for documents in the Executive Branch. In addition, the facts in *McGrain* supporting the investigation are so obviously different from those present in the instant case that there is little need to draw a comparison. The Legislative Branch understandably and continuously quotes from *McGrain* because that decision expansively describes Congress's investigative powers, However, the case is not otherwise germane to the present dispute.

right to make any use of the documents it sees fit to make. Instead, the Memorandum seems to view the issue as whether the power of the Committee to receive documents in executive session provides a "legal basis for providing that information." The question is not, of course, whether there is or is not a legal basis for the President's deciding to provide this type of information to Congress in certain circumstances. It is, rather, whether there is any legal entitlement in a Committee to receive such information if the President decides that it would be inconsistent with his constitutional responsibilities to furnish it in the specific circumstances surrounding a particular Committee request or subpoena. The General Counsel Memorandum seems to proceed from the proposition that, because Congress is constitutionally permitted to keep a secret, three separate but related *non sequiturs* follow: (a) Congress and its staff will keep secret that which it is entitled to keep secret; [5] (b) Congress is constitutionally entitled to all information in the possession of the Executive because it has the power to keep the information secret; and (c) the President has not lost control of the information because Congress has the power to keep it secret. None of these conclusions follow from the premise—a premise which you never disputed in the first place.

Second, the General Counsel Memorandum suggests that the ability of Congress to keep documents received in executive session "secret" and the courts' recognition of that ability in the context of information sought from private parties somehow is relevant to the instant dispute. All that can be said from this suggestion is that it is consistent with the overall thrust of the General Counsel Memorandum, which is that the President is to be treated for these purposes not as the head of a coequal Branch but, rather, as a private person.[6]

Third, the General Counsel Memorandum appears to suggest that the fact that material over which the President could assert privilege is often turned over to Congress establishes an unrestricted right in Congress to receive all information in the possession of the Executive Branch over the objection of the President. The argument is nothing less that an assertion that the customary attitude of the Executive Branch in attempting to accommodate requests for information by Congress and to avoid needless friction between the two Branches has effectively destroyed Executive Privilege itself. The propostion is, of course, absurd and its assertion as a serious proposition is particularly frivolous in light of the long history of refusal by the Executive to furnish documents in open law enforcement files.

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[5] During the December 2, 1982 hearing by the Investigations and Oversight Subcommittee of the House Public Works and Transportation Committee, Congressman Roemer, addressing the Subcommittee's staff, declared: "I will tell you as one member of this Subcommittee, we ought to do and encourage you to do everything possible not just to amass the information, but to turn it over to the public . . . ." p. 38.

[6] Or, perhaps, as put by Congressman Roe at the December 2 hearing "there obviously is a breach between ourselves, the governing body of the Nation, and the Executive Branch." p. 90.

2. The Scope of Attorney General Jackson's 1941 Letter to Chairman Vinson

At several points, the General Counsel Memorandum, (see pp. 3 and 10), suggests that your reliance on Attorney General Jackson's letter to Chairman Vinson, 40 Op. A.G. 45 (1941), is misplaced because, according to the General Counsel Memorandum, that opinion was limited to "nondisclosure of the FBI's criminal investigative files." Thus, the Memorandum states that application of the 1941 letter to the present situation represents "an enormous extension of secrecy." (p. 3) The General Counsel's reading of that 1941 letter is patently erroneous.

The word "criminal" does not appear a single time in the 1941 letter. The specific request for information to which Attorney General Jackson responded covered investigations of both "alleged violations of law" and investigations to gather "intelligence" information, the latter decidedly non-criminal and the former not qualified by the word criminal and not necessarily confined to criminal matters. 41 Op. A.G. at 50. Furthermore, Attorney General Jackson's letter was in response not only to Chairman Vinson's letter but to two other letters raising a very general and pervasive problem. Finally, and of particular significance given the tortured reading of Attorney General Jackson's letter by the General Counsel Memorandum, every example of prior Presidential refusals to provide documents in investigative files to Congress relied upon by Attorney General Jackson involved cases implicating the federal antitrust laws under which, historically, civil rather than criminal prosecution would have been the usual course of action.

It does not seem conceivable or credible to assert any doubt regarding the breadth of Attorney General Jackson's statement regarding the historic position of the Executive on this matter. Examples abound. Attorney General Jackson did not attempt to cite every instance. Nor did your letter of November 30, 1982 to Congressman Dingell. Another example which neither you nor Attorney General Jackson mentioned, and which is overlooked by the General Counsel Memorandum in an effort arbitrarily to narrow the scope of Attorney General Jackson's opinion, is President Truman's letter to Congressman Frank L. Chelf in March of 1952. Congressman Chelf, as Chairman of a Special Subcommittee of the Judiciary, had demanded a wide range of documents from various Executive Branch Departments including, among others, a list of all cases referred to the Department of Justice or the U.S. Attorneys for either criminal or *civil* action . . . within the last six years . . .," (emphasis added), in which action had been declined, the case had been returned or where the case had been pending in the Department for more than one year. President Truman rejected the request, declaring, *inter alia*, that while the investigative functions of Congress were important, the Constitution vested the executive power in the President and imposed on him the duty to see that the laws were faithfully executed and that "Congressional power should be exerted only in a fashion that is consistent with the proper discharge of the Constitutional responsibilities of the Executive Branch."

Another example is Attorney General Brownell's Order No. 116–56 issued on May 15, 1956. In that order, which specifically addressed requests for documents by congressional committees and which specifically covered both civil and criminal cases, the Attorney General distinguished only between open and closed cases. The order applied to all cases over which the Department of Justice had enforcement responsibility and, with regard to open cases, the policy was quite simple: "If the request [of a congressional committee] concerns an open case, i.e., one which litigation or administrative action is pending or contemplated, the file may not be made available. . . ."

Finally, we would observe that the limitation placed on access by Congress to documents in open investigative files by Attorneys General Jackson and Brownell, by President Truman, and by the other Presidents and Attorney Generals which were mentioned in Attorney General Jackson's opinion are, if anything, far greater than the policy adopted by President Reagan in his November 30, 1982 Memorandum to Administrator Gorsuch. Under both the Jackson and Brownell views, for example, congressional committees were to receive no documents found in open investigative files in criminal or civil actions; under current policy much effort will be expended by Executive Branch personnel to segregate out from these files only sensitive, deliberative documents that meet the criteria set out in your November 30, 1982 letter to Chairman Dingell. Thus, it is plain that the assertion of the General Counsel Memorandum that the current policy is an "enormous extension of secrecy" is not only unsupported by any references in that Memorandum to authorities or specific historic facts, it is flatly contrary to the facts. The policy of this Administration is less restrictive than its predecessors.

3. The Rights of Potential Targets of Investigations

The General Counsel Memorandum strives at great length to establish the proposition that the constitutional rights of potential targets of enforcement actions will not be endangered unacceptably by the documents being made available to congressional committees. It is, of course, not surprising that the courts have been generally reluctant to reverse the convictions of criminal defendants because of pre-trial publicity generated by congressional inquiry into specific cases. That reluctance, however, in no way establishes the propositon implicit in the General Counsel Memorandum that a Nation constitutionally committed to fair and impartial administration of criminal and civil justice would or should tolerate trial by congressional committee. While this basic protection to innocent persons was not stressed as a major rationale for your November 30, 1982 position, it was articulated as one of the factors and was predicated not just on constitutional considerations, but on basic notions of fairness and decency. The General Counsel Memorandum seems to suggest that if a subsequent conviction would not be overturned on constitutional grounds, these considerations somehow vanish. That clearly does not seem to be the case and, most importantly, the argument seems to ignore completely the rights of innocent persons against whom no charges are ever brought.

4. The Committee's Purpose

The General Counsel Memorandum states that the Subcommittee, in subpoenaing the documents, "seeks not to influence individual enforcement decisions, but rather to review the integrity and effectiveness of EPA's enforcement program and to evaluate the adequacy of existing law." (p. 6) We assume that the General Counsel Memorandum would necessarily have to assume such good faith on the part of the Subcommittee. Your articulation of the basis for the invocation of executive privilege similarly assumes such good faith not only by this Subcommittee, but by any congressional committee seeking Executive Branch documents. However, any policy in this area must assume, as Attorney General Jackson's 1941 Opinion did assume, the possibility of misuse along with proper use of sensitive information and, if the information is very important to a pending or developing case, it should not be disseminated beyond those directly involved in the enforcement process. It is theoretically possible that parties seeking access to documents or parties who might obtain access to documents sought by others might have relationships with potential defendants (in this case, generators of the chemicals in the hazardous waste sites). In such a situation, faith in the integrity of the process might subsequently turn out to have been misplaced and the damage would not be limited to a particular enforcement action, but to the integrity of law enforcement as a whole. Hence, if the tactical materials will not make a critical contribution to the legislative process and are primarily useful to law enforcement officials (and the potential defendant), proper attention to the faithful execution of the law requires that the circle of access to the open law enforcement file be kept as narrow as possible. The General Counsel Memorandum misses this and the following two additional crucial points.

First, the Legislative Branch was not empowered by the Constitution to participate directly and intimately in the enforcement of the law. Cf. *Buckley* v. *Valeo,* 424 U.S. 1, 138–43 (1976).

Second, and related to the first point, nowhere in the General Counsel Memorandum is there any explanation as to why access to open law enforcement files is necessary in order for the committee to perform its legitimate legislative duties. It is true that because of the relatively recent enactment of CERCLA, there are probably only a small number of closed cases the files of which could probably be made available to the committee as a way of the committee's studying the manner in which CERCLA is being implemented by the Executive. But until the committee can establish that its access to the files in closed cases coupled with the many other means by which it may inquire into this issue, including the testimony of high EPA officials regarding overall EPA strategy, methods and objectives, then there is no reason, as a matter of policy, let alone law, why the committee should have sensitive material turned over to it. As the Court of Appeals for the District of Columbia summarized the test, a test which the Subcommittee has simply not attempted to meet: "The sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Commit-

tee's functions." *Senate Select Committee* v. *Nixon, supra,* 498 F. 2d at 731 (emphasis added).

CONCLUSION

Because your prior analyses of this subject have fully recognized the legitimate interests of the Legislative Branch to investigate and oversee the execution of the law by the Executive Branch, the almost total focus on the rights of Congress in this matter by the General Counsel Memorandum adds virtually nothing to the present debate. Because the documents in issue which would be turned over to the Subcommittee become totally subject to the control of the Subcommittee, the Memorandum's discussion of the Subcommittee's power to maintain their confidentiality is beside the point. The underlying premise of the argument is that Congress has the unilateral power to determine whether the release of Executive Branch documents is, or is not, in the public interest. That theory is nothing more than an abnegation of the doctrine of Executive Privilege. The President cannot retain a privilege while turning over to Congress the decision whether it should be exercised. Finally, the attempt of the General Counsel Memorandum to portray your position, and that of the President, as an "extension of secrecy" is not only contrary to demonstrated historical fact but fails to recognizes that the current policy is far more accommodating of the interests of Congress than has been past Executive policy as illustrated by the positions of Attorneys General Jackson and Brownell.

THEODORE B. OLSON,
Assistant Attorney General
Office of Legal Counsel.

Attachment C

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGAL COUNSEL,
Washington, D.C., December 14, 1982.

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: History of Presidential Invocations of Executive Privilege Vis-a-Vis Congress.

This memorandum briefly describes those incidents in which a President personally directed the withholding of information from Congress.[1] Included are incidents in which a President found it

[1] Although an attempt has been made to be as thorough as possible, no claim is made that the following list is comprehensive. In this regard, we note Deputy Assistant Attorney General Mary Lawton's statement in a memorandum to Rep. William S. Moorhead, dated April 25, 1973:

"In response to your request . . . I regret that it is not physically possible to furnish you with a comprehensive list of presidential refusals of information to Congress. To give you all of the instances of such refusals since the beginning of the Republic would require an amount of historical research which the Office of Legal Counsel lacks the resources for handling. In addition, there is a categorization problem of distinguishing the relatively few instances of exercise of Executive Privilege *per se* [i.e., a refusal to disclose by the President personally] from the many agreed accommodations . . . for nonappearance of witnesses, nondisclosure or partial disclosure."

necessary to withhold specific documents or information, as well as general directives of a President concerning the withholding of information from Congress.

No effort has been made to catalogue the numerous instances in which information was withheld from Congress by Executive officers other than the President; nor does this survey discuss the countless examples of full disclosure by the Executive. The objective of the memorandum is neither to show how frequently the Executive Branch has refused congressional requests for information, nor to demonstrate how often an accommodation between the Branches has been achieved. Rather, the memorandum seeks to show that Presidentially mandated refusals to disclose information to Congress—though infrequent—are by no means unprecedented acts of this or any other Administration.

1. WASHINGTON ADMINISTRATION

A. St. Clair Incident

On March 27, 1792 the House of Representatives established a congressional committee to investigate the failure of General St. Clair's military expedition against the Indians. The House authorized the committee "to call for such persons, papers and records, as may be necessary to assist their inquiries."[2]

The committee subsequently asked the President for those papers pertaining to the St. Clair campaign. Since this was the first occasion in which Congress had established a committee to investigate the performance of the Executive and had authorized it to request documents from the President, and wishing "that so far as it should become a precedent, it should be rightly conducted,"[3] President Washington held a meeting with his Cabinet, attended by Jefferson, Hamilton, Randolph and Knox. Jefferson described the conclusions reached by the Nation's first Cabinet:

> We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committees nor House has a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.[4]

Although the Cabinet "agreed in this case, that there was not a paper which might not be properly produced,"[5] the President apparently felt it advisable nevertheless to negotiate with Congress a non-confrontational resolution of the problem. Jefferson thereupon agreed to speak individually to members of the House committee in

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[2] 3 Annals of Cong. 493 (1792).
[3] 1 *The Writings of Thomas Jefferson* 303 (Lipscomb ed., 1905).
[4] *Id.* at 303–04 (emphasis supplied).
[5] *Id.* at 305.

order to "bring them by persuasion into the right channel."[6] Jefferson's conciliation efforts were successful, for on April 4, 1792, the House resolved,

> that the President of the United States be requested to cause the proper officers to lay before this House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair.[7]

B. Correspondence Involving United States Minister to France

In 1794, the Senate requested by resolution correspondence between the United States Minister to France and the Republic of France, and between the Minister and the State Department.[8] President Washington submitted certain of the correspondence requested, but withheld "those particulars which, in my judgment, for public consideration, ought not to be communicated."[9]

C. The Jay Treaty

On March 24, 1796, the House of Representatives requested by resolution that the President disclose to the House his instructions to the United States Minister who negotiated the Jay Treaty with Great Britain, along with correspondence and documents relative to that Treaty. Implementation of the Treaty apparently required an appropriation which the House was called upon to vote.[10] President Washington denied the House's right to demand and receive any of the papers requested. Though the President had provided "all the papers affecting the negotiation with Great Britain" to the Senate in the course of its deliberations on the Treaty, Washington determined that the House had no legitimate claim to those papers:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

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[6] *Id. See generally* Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Power*, 20 U. Pitt L. Rev. 755, 757 (1959).
[7] 3 Annals of Cong. 535 (1792) (emphasis supplied).
[8] Senate Journal, 3d Cong., 1st Sess. 26.
[9] 1 J. Richardson, *Messages and Papers of the Presidents* 152 (1896).
[10] *See* W. Binkley, *President and Congress* 44 (1947).

Subsequently, the House debated Washington's refusal for a full month, but took no action.[11] It is highly instructive, however, that during the debate Rep. James Madison, although disagreeing with President Washington's message in some respects, acknowledged on the House floor,

> that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of a nature that did not permit a disclsoure of it at the time. And if the refusal of the President had been founded simply upon a representation, that the state of the business within his department, and the content of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticize it.[12]

2. ADAMS ADMINISTRATION

Diplomatic Material Concerning United States Representatives to France.—In 1798, the House of Representatives by resolution requested from the President documents containing instructions to, and dispatches from, representatives of the United States to France.[13] On April 3, 1798, President Adams transmitted some of that material to both Houses, but omitted "some names and a few expressions descriptive of the persons" involved.[14]

3. JEFFERSON ADMINISTRATION

The Burr Conspiracy.—In January 1807, the House of Representatives, by resolution, requested that the President:

> lay before this House any information in possession of the Executive, *except such as he may deem the public welfare to require not to be disclosed,* touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same.[15]

Moreover, it is highly unlikely Jefferson actually relied upon the exception clause as the basis for withholding information from the House, given the conclusions he reached while serving in President

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[11] *See* Annals of Cong. 426–783. The House did pass two resolutions, one declaring that the House had authority to consider the expediency of carrying a treaty into effect, the second that the House need not state the purpose for which it required information from the Executive. See 5 Annals of Cong. 771, 782–83 (1796).

[12] 5 Annals of Cong. 773 (1796).

[13] Senate Journal, 5th Cong. 2d Sess. 249.

[14] 1 Richardson, *supra,* at 265.

[15] 16 Annals of Cong. 336 (1806–07) (emphasis supplied). Professor Raoul Berger has argued that the exception clause in the House resolution refutes any argument that Jefferson's subsequent withholding of documents was based on an Executive privilege. R. Berger, *Executive Privilege: A Constitutional Myth* 179–81 (1974) (describing Jefferson's explanation for withholding information as "gratuitous"). *See also* Cox, *Executive Privilege,* 122 U. Pa. L. Rev. 1383, 1397–98 (1974) (arguing that those historical examples of Executive withholding which are preceded by a congressional authorization to withhold do not qualify as examples of Executive privilege). One could just as well read the exception clause, however, as an early illustration of congressional recognition of the Executive privilege. *See* § 1, C, *supra;* note 19 *infra.*

Washington's Cabinet, *see* § 1, A, *supra,* and given the views he expressed in a letter to the United States District Attorney for Virginia, who was then in charge of the Burr prosecution:

> Reserving the necessary right of the President of the United States to decide, *independently, what papers coming to him as President, the public interest permit to be communicated, and to whom,* I assure you of my readiness under that restriction to furnish . . . whatever the purposes of justice may require.

9 T. Jefferson, *Writings* 55 (Ford ed. 1892). Professor Berger also fails to note other occasions on which President Jefferson let it be known that he regarded himself free to withhold certain information. *See*, e.g., 10 *The Works of Thomas Jefferson* 409 n.1 (P. Ford ed. 1905).

President Jefferson replied by detailing the activities of Aaron Burr, but declined to mention the names of other alleged participants. Jefferson declared:

> The mass of what I have received in the course of these transactions is voluminous, but little has been given under the sanction of an oath so as to constitute formal and legal evidence. It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and inadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question.[16]

4. MONROE ADMINISTRATION

Stewart Incident.—In 1825, the House of Representatives requested by resolution that the President provide the Congress with documents concerning charges against certain naval officers, so far as he deemed such disclosure compatible with the public interest.[17] President Monroe refused to submit the documents, stating:

> In consequence of several charges which have been alleged against Commodore Stewart, touching his conduct while commanding the squadron of the United States [at] sea, it has been deemed proper to suspend him from duty and to subject him to trial on those charges. It appearing also that some of those charges have been communicated to the Department by Mr. Prevost, political agent at this time of the United States at Peru . . . and that charges have likewise been made against him by citizens of the United States engaged in commerce in that quarter, it has been thought equally just and proper that he should

[16] 1 Richardson, *supra,* at 412.
[17] House Journal, 18 Cong., 2d Sess. 102 (1825).